Administrative Law Judge Decisions

Commission Decisions

Old Ben Coal Company v. Secretary of Labor, MSHA, Docket No. LAKE 83-50-R, (Judge Moore, August 30, 1983).

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-336, (Judge Broderick, September 12, 1983).

Little Sandy Coal Sales, Inc. v. Secretary of Labor, MSHA, Docket No. KENT 83-178-R, (Judge Moore, October 12, 1983).

Secretary of Labor, MSHA v. Youghiogheny & Ohio Coal Co., Docket No. LAKE 83 (Judge Broderick, September 19, 1983).

Review was Denied in the following cases during the month of October:

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-321, (Judge Broderick, September 12, 1983).

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. PENN 82-337, (Judge Broderick, September 16, 1983).

Ralph Yates v. Cedar Coal Company, Docket No. WEVA 82-360-D, (Judge Broderic September 19, 1983).

October 6, 1983

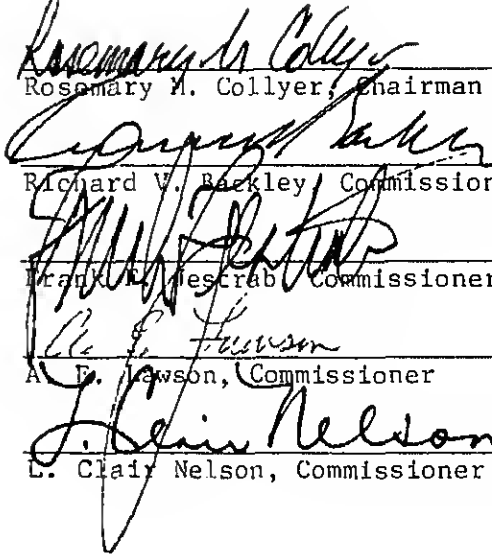
KENNETH A. WIGGINS :
:
v. : Docket No. WEVA 82-300-D
:
EASTERN ASSOCIATED COAL CORP. :

ORDER

This discrimination case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1976 & Supp. V 1981). On September 6, 1983, the administrative law judge issued a "Decision on the Merits" in which he held that Eastern Associated Coal Corp. had discharged Kenneth A. Wiggins in violation of section 105(c) of the Mine Act. 30 U.S.C. §815(c). The judge did not, however, award the miner relief. Instead, "Pending a Final Order" in this case, the judge allowed the miner 15 days from the date of his decision on the merits to submit a proposed order granting relief. The judge further allowed the operator 15 days from receipt of the miner's proposed order in which to reply. On October 3, 1983, Eastern Associated filed a petition for review of the judge's September 6, 1983 decision on the merits. 1/

Section 113(d)(1) of the Mine Act (30 U.S.C. §823(d)(1)) and Commission Rule 65(a) (29 C.F.R. §2700.65(a)) require that the decision of the judge contain an order that finally disposes of the proceedings. Because the judge has not as yet issued an order granting the miner appropriate relief he has not finally disposed of the case. Thus, the issuance of his decision on the merits did not initiate the running of the statutory review period. Jurisdiction in the case remains with the judge. Campbell v. The Anaconda Co., 3 FMSHRC 2763 (December 1981); McCoy v. Crescent Coal Co., 3 FMSHRC 2475 (November 1981).

1/ The petition was styled, "Respondent's Petition for Interlocutory Review or in the Alternative for Discretionary Review." We read the petition ss one for discretionary review. To the extent that it is intended as a petition for interlocutory review, it is denied.



Rosemary M. Collyer, Chairman

Richard V. Backley, Commissior

Frank [illegible]estrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

Charleston, West Virginia 25322

William B. Talty
Talty and Carroll
112 Central Avenue
P.O. Box 104
Tazewell, Virginia 24651

Administrative Law Judge Charles C. Moore
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

October 27, 1983

RUSSELL COLLINS AND VIRGIL KELLEY	:	
	:	
v.	:	Docket No. EAJ 83-1
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

The motion filed by counsel for Russell Collins and Virgil Kelley for permission to withdraw their petition for discretionary review in this matter is granted. Accordingly, our direction for review issued on September 2, 1983, is hereby vacated and the administrative law judge's decision stands as the final Commission order in this proceeding.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Nestrau, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

October 31, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-216
SOUTHWESTERN ILLINOIS COAL CORPORATION	:	

DECISION

In this civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), we are called upon to interpret the phrase "shall be required to wear ... safety belts and lines" in the surface coal protective clothing standard, 30 C.F.R. § 77.1710(g). 1/ The Department of Interior's Board of Mine Operations

1/ Section 77.1710 provides:

> Protective clothing; requirements.
>
> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> (a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.
>
> (b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.
>
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
>
> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
>
> (e) Suitable protective footwear.
>
> (f) Snug-fitting clothing when working around moving machinery or equipment.
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
>
> (h) Lifejackets or belts where there is danger from falling into water.

North American Coal Corp., 3 IBMA 93, 107 (1974). In his decision below, the Commission administrative law judge found North American analogously persuasive, concluded that the operator had satisfied the North American criteria, and vacated the citation. 3 FMSHRC 871 (April 1981)(ALJ). We approve the judge's adoption of the North American construction, but reverse his finding that the operator satisfied the North American criteria. We conclude that the facts show a violation, and remand for assessment of penalty.

On November 5, 1979, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) isaued a citation to Southwestern Illinois Coal Corporation alleging a violation of section 77.1710(g) at Southwestern's Captain Strip Mine in Illinois. The inspector issued the citation when he observed a miner working alone without a safety belt and line on a large stripping shovel where the inspector believed there was a danger of falling.

The miner, assigned to work as the shovel groundman, was repairing a broken grease line on the end of one of the shovel's steering arms. He was kneeling at the place where the arm was joined at right anglea to the shovel's steering cylinder. (The steering arm and cylinder functioned together to turn one of the tracked crawlers on which the shovel traveled.) The miner's immediate work location was approximately two feet wide and 12 to 15 feet off the ground. 3 FMSHRC at 873, 875, 878; Tr. 16-17, 72-75, 87, 89-90; Pet. Exh. No. 2. There were no guardrails or similar protective devices on the ateering arm or cylinder. As the inapector approached, the miner walked down the steering arm to the crawler tracks and off the machine The inspector spoke with the miner about the use of a safety belt and a line and the miner offered no explanation as to why he had not been using them.

At the time of the citation, the ahovel was not being used for atripping, although its power was on. The shovel had an automatic leveling mechanism that periodically moved the machine, including the steering arm, to level positions. Safety belta were kept on the shovel. According to Southwestern's safety director at the Captain Mine, these belts were intende for "the men to use if they are going to get in an area [on the ahovel] whe they think there is a danger of falling." Tr. 77.

A few days after the MSHA citation, the safety director issued the miner a safety violation for working in an "elevated work poaition without wearing a safety belt" in violation of federal, state, and company rules. The violation was charged to the miner pursuant to Southwestern's program of progressive discipline for violations of safety rules. This program was contained in Southwestern's safety booklet isaued to all employees.

a danger of falling, within the meaning of section 77.1710(g), in the area where the miner was working without a belt. The inspector based this conclusion on his observations that the work area was elevated, small and unguarded, that grease was likely to accumulate there, and that the machine could move while the miner was working. Southwestern's overall director of safety and training testified that the decision whether to wear a belt in a particular situation was largely up to the miner himself. He agreed that, if the facts were as the inspector testified, there was a danger of falling where the miner was working and he should have been wearing a belt.

The judge adopted and applied North American, supra. He thus interpreted the phrase "shall be required to wear" to mean only that operators must require belts to be worn, not that operators must insure absolutely that they are worn. On this basis, the judge concluded that Southwestern passed the North American test. He relied on the facts that a safety belt was available on the shovel, that Southwestern had promulgated safety rules requiring miners to wear the belts, and that the company enforced its rules by disciplining violators. In light of these determinations, the judge vacated the citation.

We first construe the phrase "shall be required to wear." In North American, the Board interpreted the identical phrase in the underground coal protective clothing standard, 30 C.F.R. § 75.1720(a). 3/ Although a failure to wear safety goggles was the specific issue in that case, the more significant focus of the North American decision was on the general meaning of "shall be required to wear." The Board concluded that these words meant only that operators must (1) establish a safety system requiring the wearing of the clothing or equipment and (2) enforce

2/ The safety booklet contained two rules concerning safety belts and lines:

> Safety belts and lanyards shall be worn if necessary.
>
> Safety belts and lines shall be worn at all times where there is a danger of falling. If belts or lines present a greater hazard or are impractical, notify your supervisor so that alternative precautions are taken.

Res. Exh. No. 1, Section VII, Rules 8 & 9, p. 8.

From the time of the safety booklet's publication in 1978 to the hearing, Southwestern issued approximately 50 safety violations, three of which (including the one issued to the miner) involved safety belt infractions. The majority of the 50 violations were first warnings.

3/ Like the surface standard at issue in this case, section 75.1720 begins by providing that "each miner ... shall be required to wear the following protective clothing and devices" (emphasis added), and then

them, then a violation has not occurred" (emphasis added). Id. 4/ agree with the judge that the North American construction is the nat reading of the words in issue.

The regulation does not state that the operator must guarantee belts and safety lines are actually worn, but rather says only that employee shall be required to wear them. The plain meaning of "requ is to ask for, call for, or demand that something be done. See Webs Third New International Dictionary (Unabridged) 1929 (1971). Accord when an operator requires its employees to wear belts when needed, a enforces that requirement, it has discharged its obligation under th regulation. We respectfully disagree with our dissenting colleagues that "shall be required to wear" means "shall be worn." The two phr are not the same, and we do not find persuasive a reading that conve a duty to require into a duty to guarantee. Certainly, the purpose the standard is to protect miners, but the standard as written provi for that protection by directing that operators require the belts to worn.

The Secretary of Labor argues through counsel that the regulati should be read as if the words "shall be worn" are contained in the regulation. If the Secretary wanted that phrase to obtain we are co strained to ask why he did not make the appropriate changes nine yea ago when North American was issued. To tell us now that "shall be required" is the same as, or stronger than, "shall be worn" is an assertion that cannot be squared with the Secretary's understanding North American. Further, the words "shall be worn" are used in othe regulations promulgated by the Secretary. 5/ In effect, the Secreta is asking us to amend the regulation, but amendment is his province, ours. The Commission is an independent adjudicatory agency that pro trial and appellate review under the Mine Act.

Our holding is restricted to the language of this standard, and does not create an employee disobedience or negligence exception to liability without fault structure of the Mine Act. Our concern is c with the duty of care imposed by this one regulation and, as indicat above, we hold that the duty is one of requirement diligently enforc not guarantee.

4/ After the issuance of North American, some discerned in the dec a recognition of a general employee disobedience and negligence exce to the liability without fault structure of the 1969 Coal Act. The itself repudiated that reading of the decision and any such exceptio the liability scheme of the 1969 Coal Act (Webster County Coal Corp. 7 IBMA 264, 267-68 (1977)), and we have done the same. Nacco Mining 3 FMSHRC 848, 849 & n. 3 (April 1981).

5/ The metal and nonmetal personal protection standards dealing wi safety belts and lines use the phrase, "shall be worn." 30 C.F.R. §§ 55.15-5, 56.15-5 and 57.15-5.

sufficiently specific and diligent enforcement of that requirement.

As noted in the summary of facts above, Southwestern's general director of safety and training testified that the decision whether to wear a belt was largely up to the miner himself. At oral argument before the Commission, Southwestern's counsel reinforced this point by stating that the use of a safety belt in any given situation at the mine was "optional" with the employee. The general safety director also testified that there were no signs at the mine reminding employees to wear belts, and conceded that no safety analysis had been conducted or directives issued to identify specific working situations where belts should be worn. We do not suggest that the operator necessarily had to engage in any one of these steps to satisfy its responsibilities under the standard, but we find a virtual absence of any specific guidelines and supervision on the subject of actual fall dangers.

In sum, the evidence reveals that the wearing of belts was delegated to the discretion of each employee, with only general guidance at best. As a matter of law and evidence, this falls short of demonstrating due diligence in enforcement. It is important to note in contrast, in the North American case, that the operator had a more specific program aimed at avoiding the particular hazard through prominent signs and constant verbal warnings and reinforcement of safety considerations. 3 IBMA at 107-08.

Regarding the incident that led to the citation, there is no dispute that the miner was working unsupervised on an elevated platform without a belt and line. The evidence also clearly shows that there was a danger of falling. 6/ The decision not to wear the belt was made by the miner, but

6/ The miner's work platform was only about two feet wide and 12 to 15 feet off the ground. This was an area where grease lines and fittings were located, and as the inspector testified it was likely that grease would accumulate there causing a slippery surface. The shovel's power was on, and it also had an automatic leveling device that could move the steering arm on which the miner was working. Thus, the machine could have moved during his work. Applying the analogous test we recently adopted in Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983), to assess fall dangers under a metal and nonmetal personal protection standard (30 C.F.R. § 57.15-5), we conclude that an informed, reasonably prudent person would have recognized a danger of falling under these circumstances. The mine's safety director initially testified that he had measured the work area to be about four feet wide; however, he subsequently conceded that he incorrectly made his measurements further back on the steering arm. He also testified, without explanation, that he did not believe there was a danger of falling where the miner was working. The facts summarized above do not support this opinion.

North American interpretation of section 77.1710(g), but conclude tha
Southwestern nevertheless violated the standard so construed. We rem
for determination of an appropriate penalty.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

I understand the learned majority of the Commission to base their decision on the so-called North American defense set forth by the Board of Mine Operations Appeals wherein it was held that an "identical" phrase "shall be required to wear" required the employer to establish a safety system "requiring the wearing of clothing or equipment and enforce such system diligently." My colleagues further state that "shall be required to wear" and "shall be worn" are not the same and they "do not find persuasive a reading that converts a duty to require into a duty to guarantee." From this I apprehend that we would all agree, as we have in the past, that if the pivotal phrase was "shall be worn," North American would not apply and the operator's safety program and its efforts to enforce it would be irrelevant to the finding of a violation. U.S. Steel Corporation, 1 FMSHRC 1306, 1307 (1979).

With all deference and respect to the majority, I am not satisfied that there is any distinction in the duty imposed on the operator under the Mine Act by the phrase "shall be required to wear..." and the simple "shall be worn." However, I do not reach the question of the meaning of "shall be required to wear" in this case because as I read the regulation it is not the applicable verb phrase for the subsection which was cited for the violation. Whether the duty imposed is a duty to enforce a program (shall be required to wear) or a duty imposing liability without fault (shall be worn), we agree that the operator has not satisfied his duty in this case and that the decision of the administrative law judge should be reversed. I concur in that result, but I base my decision on narrower grounds.

It seems to me that our first assignment is to interpret the regulation at § 77.1710 1/. The initial clause of subsection (g), which

1/ § 77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

(b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.

(c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

in subsection (a) is shall be worn. 2/ Further, a proper verb form must agree with other verbs in the same subsection and in the second clause in subsection (g), it is provided that a person shall tend the lifeline. It does not say "shall be required" to tend. If I am correct, and I believe that I am, then North American has no relevance to this case and the operator's duty here is a duty imposing liability without fault. 3/ U.S. Steel Corporation, supra, and Mid-Continent Coal and Coke Co., supra at n. 2.

Second, it is well established that the Mine Act imposes liability without fault upon operators. Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), A. H. Smith Stone Company, 5 FMSHRC 13 (1983). The authority which Congress delegated to the Secretary of Labor carries with it the responsibility to promulgate regulations which mirror the concept of

---

fn. 1/ continued

> (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, non-metallic based paint shall be used.
>
> (e) Suitable protective footwear.
>
> (f) Snug-fitting clothing when working around moving machinery or equipment.
>
> (g) Safety belts and lines [shall be worn] where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
>
> (h) Lifejackets or belts where there is danger of falling into water.
>
> (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided. (Emphasis mine. Phrase in brackets also mine, supplied by relation back to subsection (a) to illustrate how I read (g).)

2/ Upon previous examination of subsection (a) of 30 C.F.R. § 77.1710 the Commission interpreted the phrase "shall be worn" according to its literal meaning, Mid-Continent Coal and Coke Co., 3 FMSHRC 2502, 2506 (198 See U.S. Steel Corporation, supra.

3/ For the record, the regulation at issue here is not the same as the regulation cited in North American. That regulation is 30 C.F.R. § 75.172 of which subsection (a) was cited. Note that there is no verb in subsection (a) and to supply one it is necessary to relate back to the last, preceding verb which is "shall be required to wear", appearing in

(Footnote continued)

to liability without fault which have not been placed in the Act by Congress. U.S. v. Atchison T. & S.F.Ry Co., 156 F.2d 457 (9th Cir. 1946).

In this case the operator's employees were observed without the protective equipment required by 30 C.F.R. § 77.1710(g)--safety belts and lines--where there was a danger of falling. For the reasons set forth above, I believe this constitutes a violation of that regulation and I concur with the result reached by my colleagues in the majority, that the administrative law judge should be reversed and a violation found.

Frank F. Jestrab, Commissioner

fn. 3/ continued

the preamble. Nowhere in the regulation does the verb phrase "shall be worn" appear:

> § 75.1720 Protective clothing; requirements.
>
> On and after the effective date of this § 75.1720 each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:
>
> (a) Protective clothing or equipment and face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles.
>
> (b) Suitable protective clothing to cover those parts of the body exposed to injury when handling corrosive or toxic substances or other materials which might cause injury to the skin.
>
> (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
>
> (d) A suitable hard hat or hard cap. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
>
> (e) Suitable protective footwear.
>
> (Emphasis Mine)

protection in the mining industry. Indeed, their definition is significantly--and selectively--less inclusive than that found in Black's Law Dictionary (5th ed.) (p. 1172), which defines "require," inter alia. to mean "compel ... command," certainly not precatory terms.

Subsections (a) and (c) of this standard delineate which protective clothing "shall be worn," or "shall not be worn." There is no indication that creation of a third category of protective clothing, which "shall be worn if directed to do so by the operator," is or was intended. It is evident that the only purpose of 77.1710(g) is to insure or guarantee that safety belts must be worn "where there is danger of falling." The miner is not protected when there is a danger of falling unless he is actually wearing a safety belt; the wearing of that belt is therefore what the standard requires.

This interpretation is confirmed by the language of regulation 30 C.F.R. 77.403a(g), to cite but one example. The Secretary has construed "shall be required to wear" to mean "shall be worn" in 30 C.F.R. 77.403a(g) That standard provides that:

> Seat belts required by 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped by ROPS (roll over protection structures) by 77.403(a). (Emphasis supplied.)

The core sense of "require" is to mandate, not exhort--that which is required, shall be done. See Mississippi River Fuel Corp. v. Slayton et al, 359 F.2d 106, 119 (8th Cir. 1966): "Required" implies something mandatory, not something permitted by agreement."

As the Secretary persuasively points out, the phrase, "shall be required," emphasizes that it is the duty of the operator to insure the wearing of safety belts and lines, and that breaching that duty is a violation of the Act. This construction carries out the purpose of the Act by expressing the standard's sole purpose: to protect miners from the danger of falls. Although it appears unnecessary of repetition, regardless of the existence of even a diligently enforced company rule, a miner is not protected from the danger of falling unless he is actually wearing a safety belt. There is no meaningful, nor even semantically persuasive distinction, between "shall be required to wear" and "shall be worn."

as contended by the majority, then the commands of Part 77, as well as several other sections of 30 C.F.R., would be rendered nugatory, rather than compelling that a named protection or action is to be taken to assure miners' health and safety.

Pursuing the majority's reasoning would result in ridiculous constructions. See for example, 30 C.F.R. 75.313, which states that "the Secretary shall require such monitor to deenergize automatically...." Substituting "direct" for "require," as does the majority here, would necessitate direction being given to an inanimate object--an absurd result. The word "require" or "required" is a mandate to the operator to guarantee that a methane monitor will deenergize automatically, as in section 75.313, and that safety belts shall be worn, as set forth in section 77.1710. 2/

Adopting the majority's test would thus be an invitation to an operator, despite the fact that its miners are being subjected to safety and health hazards, to avoid responsibility merely by demonstrating that it has established a safety and health program under which miners are told to wear safety belts. Uniform safety practices and protection throughout the mining industry, 3/ absent clearly defined exceptions, are the obvious goal of the Act and these regulations.

This interpretation is congruent with those final--and absolute--responsibilities placed upon the operator by the Act to prevent safety and health hazards to miners, including forestalling employees from engaging in unsafe and unhealthful activities. 30 U.S.C. § 801(e) and 30 U.S.C. § 811(a)(7).

1/ A complete review of all of the six hundred eighty-eight pages of 30 C.F.R. (Part 0-199) has not been made.

2/ Section 77.1710 is titled: "Protective Clothing, Requirements." (Emphasis supplied) Certainly this title does not suggest "directions" to miners. To the contrary, it means requirements imposed on the operator.

3/ I agree with my colleague Commissioner Jestrab, for the reasons he stated, that the authority which Congress delegated to the Secretary of Labor carries with it the responsibility to promulgate regulations which mirror the concept of liability without fault. Neither the Secretar nor this Commission has any authority to interject exceptions. Slip op. at 8-9. As is well established, if a miner, despite an operator's best efforts, negligently or disobediently fails to wear a belt, the operator's efforts toward enforcement, or lack of negligence can be

Finally, the majority's construction of applicable precedent is deficient. The dicta relied upon from North American represents the only of the Board of Mine Operations Appeals (BMOA), (a non-independ body subordinate to the Secretary of the Interior) then charged with contradictory responsibilities of maximizing coal production, and en mine safety. Legis. Hist. 998, 1011, 1154-55. Moreover, even the in Webster County Coal Corp., 7 IBMA 264, 267-68 (1977) retreated fr if indeed it did not invalidate, its prior North American dicta. No has the Secretary of Labor, since passage of the Mine Act, taken oth than a consistent position, as advanced by him in this case.

More relevantly, and more recently, this Commission held--unani that "to the extent that these dicta suggest an exception to the lia without fault structure of the 1969 Coal Act, they are out of line w and do not survive, the well established precedents cited above." Mining Co., supra, 849, n.3. See also Pocahontas Coal Co. v. Andrus 590 F.2d 95 (4th Cir. 1979); El Paso Rock Quarries, 3 FMSHRC 35, 38- (1981); Ace Drilling Coal Co., Inc., 2 FMSHRC 790 (1980); aff'd mem. (3rd Cir. No. 80-1750, Jan. 23, 1981); Peabody Coal Co., 1 FMSHRC 14 1495 (1979); United States Steel Corp., 1 FMSHRC 1306, 1307 (1979); Ruston Mining Co., 8 IBMA 255, 259-60 (1978), and Valley Camp Coal C 1 IBMA 196 (1972).

In summary, there is no exception to the present liability with fault mandate of the Mine Act, nor it would appear did any survive, as dicta, the passing of the Board of Mine Operations Appeals. The economic incentive provided by this keystone of the 1977 Act would obviously be undercut, if, as the majority now proposes, the law is be changed, and only if the operator is negligent in monitoring his "safety program", is liability to be imposed. As has been often not both under this Act and elsewhere, this Commission must be "guided b the familiar canon of statutory construction that remedial legislati should be construed broadly to effectuate its purposes." Tcherepnir Knight 389 U.S. 332, 336 (1967). The Mine Act and the safety standa promulgated under the Act clearly constitute remedial legislation. the United States Court of Appeals for the Third Circuit stated:

4/ 30 C.F.R. §§ 55.15-5 (metal open pit), 56-15-5 (sand and gravel) 57.15-5 (metal underground), provide that "Safety belts and lines sh worn when men work where there is a danger of falling."

St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959).

I agree with the majority that the evidence clearly shows that the miner was not wearing a safety belt, and that there was a danger of fallin Accordingly, for the reasons stated above, I conclude that Southwestern violated 30 C.F.R. § 1710(g) and would remand for determination of an appropriate penalty.

A. E. Lawson, Commissioner

Administrative Law Judge Decisions

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 82-20-M
	:	A.C. No. 08-00551-05009
v.	:	Port Sutton
INTERNATIONAL MINERALS & CHEMICAL CORP., Respondent	:	

DECISION

Appearances: Ken W. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner; William B. deMeza, Esq., Holland & Knight, Bradenton, Florida, and Howard E. Post., Esq., International Minerals Corporation, Northbrook, Illinois, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petit against the respondent pursuant to section 110(a) of the Feder Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of the mandatory noise standards found at 30 CFR 55.50(b). Responden filed a timely answer and a hearing was convened in Tampa, Florida, on June 7, 1983. The posthearing arguments and propo findings and conclusions filed by the parties have been consid by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and the implementing regulatory standard as alleged in the proposa for assessment of civil penalties, and, if so, (2) the appropr civil penalties to be assessed against the respondent for the

(4) the effect on the operator's ability to continue in business (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

2. Mandatory standard 30 CFR 55.5-50, provides as follows:

> 55.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Sub-district Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1) + (C_2/T_2) + \ldots (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\log T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Stipulations

The parties stipulated to the following (Tr. 7-9):

1. Respondent's products affect commerce and respondent is subject to the Act.

2. Respondent's gross business revenues for the fiscal year 1982 were in excess of one billion dollars, and the penalties proposed for the citations in question will not affect the respondent's ability to remain in business.

3. Respondent's history of prior citations is that state in MSHA's computer print-out, exhibit P-1.

> The car unloader was exposed to 2.01 times the permissible limit for noise for a full shift. Hearing protection was not being worn and all feasible engineering or administrative control were not being utilized.

The inspector fixed the initial abatement time as December 1, 1980, and on December 3, 1980, he extended t abatement time to January 2, 1981, and noted as follows:

> Ear protection was being worn. Citation No. 094927 is modified from 55.5-50 to 55.5-50(b), which requires the development and installatio of feasible engineering controls. The citatio termination due date is also extended to 1-2-8 to allow time to implement control measures. Hearing protection shall be worn until the noi levels are reduced to permissible limits.

On January 13, 1981, the inspector extended the aba further to February 13, 1981, and he noted as follows:

> Various noise control measures have been tried but were not satisfactory. The problem had be referred to the engineering dept. The extensi is granted to allow time for the engineering dept. to develop a control measure.

On March 9, 1981, the inspector extended the abatem time to May 15, 1981, and he noted the following:

> Citation 0094927 is extended to May 15, 1981 to allow MSHA's Pittsburgh Technical Support Center ample time to evaluate the noise proble and make a determination as to whether or not feasible engineering controls are available.

On May 27, 1981, the abatement time was further ext and Inspector Charles D. Cox noted the following:

> This citation is extended as additional time is needed for feasible engineering studies by MSHA technical support group.

on this equipment which may be required at a later date. In the meantime, suitable protective hearing equipment shall be worn when persons are exposed to this noise source.

Inspector McLaughlin issued a second section 104(a) Citation No. 094928, on November 26, 1980, citing a violatio of 30 CFR 55.5-50, and the condition or practice is describe as follows:

> The car unloader was exposed to 2.03 times the permissible limit for noise for a full shift. Hearing protection was not being worn and all feasible engineering or administrative controls were not being utilized.

Inspector McLaughlin modified the citation to reflect a citation to section 55.5-50(b), and both he and Inspector extended the abatement times to and including August 1, 1981 and the reasons for these actions are the same as those note above in connection with Citation No. 094927. On September Inspector Cox terminated Citation No. 094928, for the same r that he terminated the previous citation.

Petitioner's proposal for assessment of civil penalties in this case was filed on December 21, 1981, and it asserts that respondent operates a mine at Hillsborough County, Florida, "which produces phosphate and its miners handle or otherwise work with and on goods, materials, supplies and equipment produced at or destined for points outside the State of Florida".

Respondent's answer was filed on January 18, 1982, and respondent does not dispute MSHA's jurisdictional assertion. With regard to the alleged violations, respondent's answer states the following defenses:

> a) there are no feasible administrative or engineering controls to reduce the noise level in the area referred to in the citations;
>
> b) the conduct described in the Citation is not in violation of the cited standard in

requires miners to wear personal protective equipment when working in the area referred to in the Citation;

c) the conduct described in the Citation was the result of unpreventable employee misconduct;

d) the condition described in the Citation is not such that it would significantly and substantially contribute to the cause and effect of a mine safety and health hazard;

e) the existence of the alleged condition was not the result of an unwarranted failure to comply with the cited standard.

MSHA's testimony and evidence

MSHA Inspector Arthur McLaughlin confirmed that he conduct an inspection at the respondent's phosphate plant on November and he was accompanied by union and company representatives. He also confirmed that he issued two noise citations after determining that the noise exposure for two employees working in the plant railroad dumping building exceeded the required levels. He described the cited work location as an open-ended building about 100 feet long and 40 feet wide with a railroad track down the middle and an open grated floor below for the dumping of the mined materials which are transported to the building by railroad cars and dumped below and through the grated floor to a conveyor belt (Tr 12-17).

Mr. McLaughlin stated that the two workmen stationed in the work area use pneumatic wrenches to open the gates located at the bottom of the railroad cars, and that the men are on opposite sides of the car during the dumping proces He observed that the men were not wearing ear protection devices, and since the work area was loud, he concluded that the men were probably over-exposed to noise and he confir this preliminary "noise screening" by use of a sound millimete He returned to the plant the next day, November 26, 1980, to conduct a full noise compliance survey. He confirmed that he calibrated and checked his noise and sound level dosimeters, which he described as a General Radio Type 2, 1954, sound leve meter, and installed the dosimeters on the two workmen. He sampled them for a little over seven hours and found that they were both over-exposed, and both were exposed to 95

was engaged to the railroad car door opening fitting (Tr. 17-2

On cross-examination, Mr. McLaughlin stated that he perfo no tests to differentiate the various noise sources present in the loading area in question, and he confirmed that hc could not have made such tests with the equipment he had on the day of the inspection. He also confirmed that when he conducted the noise tests he did not have the two employees under continuous observation and he could not state whether the dosimeterswere tampered with during the testing period (Tr. 23-26).

In response to bench questions, Mr. McLaughlin confirmed that had the cited workers worked only four hours they would have been in compliance, and he indicated that the dosimeter only registers noise levels in excess of 90 dBA's. He also confirmed that it was respondent's policy to make ear protectic available to employees, but he did not know whether the cited employees were ever supplied with such ear protection, and he did not ask them (Tr. 27-28).

Mr. McLaughlin was of the view that in order to comply with section 55.5-50, a mine operator should conduct noise surveys, locate any problems, and then attempt to solve them. He believes that a 90 dBA noise limit is workable, and that for every 3 decibles of noise reduction, sound pressure diminishes by 50%. He confirmed that he would have issued the citations even if the two men had been wearing ear protection, he would have cited the respondent for not using engineering controls to reduce the noise levels (Tr. 32).

Mr. McLaughlin stated that he recommended to the responde that a barrier or acoustical wrapping with sound absorption materials be used to reduce the wrench noise. His recommendat that personal ear protection be supplied immediately was followed by the respondent (Tr. 33). He confirmed that the wrench operators work on both sides of the cars simultaneously that they are exposed to the noise from each other's wrench, and when there is no unloading going on they would simply sit in the car unloading area (Tr. 34-35).

Mr. McLaughlin indicated that while the car shaker is another noise source, it is operated from a control booth and is insulated from noise level above 90 dBA's. He confirme that the workers at the car unloading area worked eight hour shifts, three shifts a day, seven days a week, and that two

reduce the car shaker noise levels indicated that the respo
was aware of the fact that a noise problem existed (Tr. 38)
Mr. McLaughlin indicated that he did not return to the plan
the citations were issued except for the purpose of extend
the abatement times, and he believed that the wrenches in qu
were still being used (Tr. 39).

In response to further questions, Mr. McLaughlin state
that he saw no noise controls installed on the wrenches dur
the time he was at the plant and he did not observe the car
shaker in operation. He had no actual knowledge of the
number of daily car trips to the plant, and believed that a
of the cars were of uniform size and construction. He was
not aware of any additional noise citations at the plant si
1980 (Tr. 40-41).

Jerry W. Antel, Engineering Technician, MSHA's Physica
Agents Branch, testified as to his background and experienc
in the field of noise and noise surveys, and he indicated
that the purposes of such surveys is to identify noise sour
and to make recommendations for noise reductions. He confi
that he visited the respondent's Port Sutton Plant in April
and May 1982, and that he did so at the request of MSHA's l
field office. He confirmed that he conducted his noise sur
at the metal building where the locomotive cars enter on a
rail line to be unloaded onto a belt system which conveys t
mined materials into the plant, and his mission was to
investigate the cited pneumatic wrench noise and to make
recommendations for improvements. During his April visit h
observed two workers in the unloading area, and the locomot
operator was also present (Tr. 42-47).

Mr. Antel stated that during the April visit he observ
dust collectors on one side if the unloading building, and
car shakers mounted on the other. After calibrating the
dosimeters, he placed them on the two workers, and he
explained the procedures and the results of his survey (Tr.
51). He confirmed that the primary noise source was the
pneumatic wrench which was used during the loading and unlo
of the railroad cars (Tr. 51). He stated that the sound le
meter readings during the opening of the cars was in the ra

peaks. He identified exhibit no. 6 as the report he prepared on the first visit in April and he suggested an enclosure be constructed around the body of the wrench to muffle both the exhaust noise and the noise radiating from the wrench body. He also recommended a flat box be fitted over the chuck to deflect noise downward. In addition, he recommended three administrative controls. One, that the men should usuall leave the area when cars came through; two, that the tram whist should not be blown unless necessary; and three, that the flagm generally avoid riding in the locomotive cab (Tr. 52-55).

Mr. Antel identified exhibit P-7 as some instructions for the construction of a wraparound muffler for the reduction of noise on the wrench in question, and he confirmed that this was part of his recommendations for reducing the noise on the wrench. He also indicated that the wraparound device was commercially available from the EAR Corporation in Indianapolis and he believed that the use of this device would lead to a minimum 5 db reduction in noise, and that the device would cost about $65 in material and installation, and could be installed by one man in one day (Tr. 57). He also was of the view that the installation of this wraparound device would not lead to any maintenance or utilization problems, and he stated that he had installed the device on other pneumatic dril (Tr. 58-59).

With regard to his second visit in May 1982, Mr. Antel confirmed that he took note of the noise controls which the respondent installed on the wrenches in question. These included modifications to the wrenches by the installation of sheet steel barrier lines with acoustical foam to shield the wrench operators from the noise and a hose muffler attached at the exhaust end of the wrench to cut down the noise (Tr. 59- Mr. Antel identified certain photographs which he took during both of his visits, and they include the wrench before and after the acoustical treatment or improvements (exhibits P-5 and P-8).

Mr. Antel stated that the noise control improvements made the respondent did not correspond to those which he had recomme and using the same sample equipment he used during his April 1

of 104, 106 dBA's for the untreated wrench, and 102 and 104 dba's for the treated wrench (Tr. 65).

Mr. Antel stated that he observed the utilization of the modified wrench for the entire shift on the second day of the visit. He estimated the noise controls reduced exposure by 5 dB's and noticed that the operator experienced minor difficulties in engagging the wrench because of the flap. He neither noticed nor was informed of any resulting maintenance problems. He approximated the material cost of IMC's improvements at $95 to $100, and the installation time to be one day. He considered the 5 dB reduction significant because it could increase the operation time of the equipment by two fold, and represented nearly 75% of the sound tolerance. Mr. Antel also related that MSHA's offer that a wrench be shiped to MSHA in Pittsburgh, to be modified and tested at MSHA's expense, with the respondent responsible for shipping, was rejected by the respondent (Tr. 66-69).

On cross examination, Mr. Antel conceded that some additic noise generated from the chucks engaged in the car and from the car itself, but that he did not "isolate or quantify" these other noise sources. He also conceded that the railroad cars were of varying sizes and construction, and he did not believe he had tested the treated and untreated wrenches on the same car door. Thus, the testing would not reflect variations between the wrenches nor between different types of cars. Of an estimated 50 cars that were opened and closed, he took measurements of ten to fifteen (Tr. 69-72).

Mr. Antel confirmed that the noise exposure indices for tl two untreated wrenches for the full shift noted in the citatio were 201% and 203%, and he noted that in his report of July 12 (exhibit P-9), he found under a similar situation that the untreated wrench generated noise at a level 453% of the permis dosage. He explained the discrepancy in the test results as follows (Tr. 73-74):

> A. I believe that can be accounted for due to the variables, not only in the types of cars, but also in the number of cars that, in which the wrench is used. If I could refer back to my first visit, we witnessed about fifty cars, fifty-two cars that were being unloaded that day, but only on about half of these the wrench was used. And the other

A. I am saying that one day might vary from another day, depending on the number of cars they are opening.

Q. You are suggesting then that those figures are invalid?

A. No, I am saying that those figures were valid for that day.

Q. You only tested them one day? On the follow-up visit?

A. The follow-up visit we did one full shift, sir.

Mr. Antel did not know how many days per month cars were normally unloaded, nor how many hours employees were exposed to the wrench noise, and therefore could not give a professiona estimate as to the magnitude of potential harm to the employees He agreed that a hypothetical wrench flap which obscured the operator's view of the connection points, or which had to be kicked into position, or an exhaust muffler which, because of severe working conditions, led to the wrench being repaired two or three times more than usual, would not be a feasible device. He also said that it was possible for the treated wrench to be used in compliance with the noise standards depending upon the amount of exposure received over varying periods of time (Tr. 76-77).

In response to further questions, Mr. Antel explained that because of the design of certain car doors, a bar was used to manually open the doors, and that this procedure produced no noise problem. He further stated that he did not know who owned or controlled the cars. He understood that the respondent's reluctance to ship a wrench to MSHA stemmed from that fact that there were normally three wrenches operating and two in the shop. Also, he had never heard of a device such as the wrench being used anywhere else. He conceded that one could not guarantee that once modifications were made on the wrench it would forever remain in compliance (Tr. 81-83).

He also explained that the two to three day installation time referred to in the answers to interrogatories included five or six hours of "curing time" needed for the molten urethane material to dry (Tr. 98). He confirmed that no recommendatio have ever been made to do anything with the locomotive cars in terms of noise controls, and he conceded that if part of the noise problems came from the cars someone would need to address that problem, but that the respondent does not own the cars (Tr. 101-102). He conceded that the noise from the cars doors was a contributing factor (Tr. 102).

Respondent's testimony and evidence

Donald R. Erickson, plant maintenance supervisor, testi that he has tested the wrench in question and supervised the installation of various noise suppression devices on the wren These "treatments" consisted of a steel plate which was added to the frame of the machine extending to the toe plate, a box fitted over the wrench bit cover, and a hose muffler adapted to the exhaust port. Because of the differences between the wrenches used at the plant, any modifications would have to be specially fabricated to fit each individual machine. He confirmed that the respondent did not modify all of the five wrenches used at the plant, and he estimated that it took 32 man hours to treat one wrench. He also esti the cost of materials and labor for one wrench to be approximately $750. He also stated that increased maintenan costs would result after each wrench was modified because such modifications would result in the wrench being required to be serviced two or three times more than normal because of the modifications. Specifically, he cited the hose adapt for the exhaust muffler on the modified wrench, and he estim that it would have to be replaced nine times a year at a cos of $50 for each replacement installation. He also stated that the rear housing on each of the wrenches would have to be replaced three times a year at a cost of $650 each time it was replaced on a single wrench. He concluded that the t costs in labor and materials for the five modified wrenches would approximate $19,500 a year (Tr. 105-119).

On cross examination, Mr. Erickson confirmed that only one wrench had actually been modified, and that he supervise

costs which he testified to concerning the one wrench which was modified was based on his experience with the wrench which was modified for test purposes, but he could not state how long the testing period lasted (Tr. 130).

In response to further questions, Mr. Erickson stated that the modified wrench was tested on four different operationa occasions, and that during these tests the wrench operators expressed a desire to have the bit cover shroud and the bottom deflector removed from the wrench because it got in their way while they were operatint it. Conceding that he had no knowledge of the actual test results, he did confirm that the employees who operated the wrench expressed a preference to use the wrench in its original untreated form (Tr. 135-138).

Mr. Erickson stated that the wrench supplier was asked to inquire of the manufacturer as to whether or not muffler or other noise controls could be installed on the machine, but that the response was negative (Tr. 142). He speculated that if one wrench were shipped to MSHA for prolonged testing, this would affect production because the initial dumping process by use of the wrenches was a critical part of the plant's production process. This was particularly true when one or more of the wrenches are down for maintenance (Tr. 152). He confirmed that the wrenches were sent to the maintenance vendor at least once a month for routine maintenance and would remain there for a week to a month. All of the wrenches in use at the plant are approximately two to four years old. Although Mr. Erickson could not state a routine maintenance estimate for an untreated wrench, he did indicate that the vendor's bills rarely were for less than $175 to $200 for each trip to the shop (Tr. 154). He agreed that each new wrench probably cost in the area of $4500 each (Tr. 156). He confirme that he was not present when the treated wrench was tested at the work site, and had no knowledge of any of the test procedur (Tr. 157).

Eugene I. Rowell, respondent's safety supervisor, testifie as to his background and eight to nine years' experience in industrial safety and hygiene, including conducting noise surveys and using sound level meters and dosimeters (Tr. 159-16 He stated that shipments of rock to Port Sutton came in so

lower hoppers. In a full day, the workers might spend four to six hours unloading fifty to sixty cars. Only when the doors were being opened were the pneumatic wrenches utilized (TR. 164).

Mr. Rowell stated that the lead flagman had radio cont with the train engineer and was responsible for the recove of cars which needed to be dumped, storing them after unloa and opening the car doors on his side of the track. If ti allowed, crew members were often assigned to other duties until a new shipment arrived. At times, three days passed without a single car being unloaded, and he added that he never seen the shaker used in the rock unloading during his three years at the plant (Tr. 166).

Mr. Rowell described the employees' hearing conservat program at the Port Sutton facility. All workers involved in the unloading process were required to wear hearing protection, and they received some training in noise hazard as part of a mandatory MSHA course. Mr. Rowell approximate the weight of one pneumatic wrench to be 130 pounds. Howe any sound treatment equipment would add 20 to 30 pounds ex weight to each wrench (Tr. 169). He further indicated tha this additional weight would enhance the likelihood of bac injury among the operators, and that the modifications wou also obscure a worker's view of the wrench bit when he tri to insert it into the car door. An employee's attempt to operate the wrench without a secure connection could lead to the bit flying off and injuring someone (Tr. 170).

Mr. Rowell recalled that, in response to the MSHA citations, plant management conducted noise tests on four five occasions, and he briefly described some of the testi He reiterated the potential hazards which would result fro decreased visibility on a treated wrench due to the flap covering the coupling. With regard to administrative cont for noise reduction, he stated that the existing union con would frustrate any plan for personnel rotation, and that would cost more money to add a part-time crew. The compan does not own the railroad cars, and therefore it lacked th ability to modify their design. Mr. Rowell also discussed the dangers of using the car bar as an alternative to the pneumatic wrench, and indicated that one reason for the ad of the wrench was to avoid the frequency of bar related accidents (Tr. 182-187).

Mr. Rowell estimated that the ear plugs supplied to t employees reduced the sound level 188 by 15 or 20 dBA. Th annual cost for plugs would be about $20 or $30, while ear

solutions for ameliorating the noise problem (Tr. 188).

On cross examination, Mr. Rowell denied that either he or his supervisor had been aware of the noise problem in the unloading area, and he could recall no noise surveys being conducted prior to the MSHA inspection. The employees were instructed in their training classes that whenever they felt a need for hearing protection or sound tests in their work area, they were to notify their supervisor or the safety department, who would then supply the protection and conduct the tests. Although he did not know of any other sections with noise problems, he stated that there were some workers who did choose to wear hearing protection (Tr. 189-190).

With regard to the company noise surveys, (exhibits R-8 an R-9), Mr. Rowell confirmed that he used a Quest Type 2 sound level meter, but that no dosimeters were used. He confirmed that he was not familiar with the error factor on the particula sound level meter used. He also confirmed that he accompanied Mr. Antel on both surveys, and in the 1982 testing took samples at the same time as the MSHA personnel. He agreed that there was about a five dBA reduction on the treated wrench, but was not sure if that was reflected in the company survey report, exhibit R-8. Nor was he sure how that figure was arrived at, and he admitted not knowing exactly how much weight would be added to the wrench because of the noise contro He conceded that not all of the controls installed on the wrench corresponded to those suggested by MSHA. Mr. Rowell confirmed that he took the readings for the May 26, 1982, surve which was incorporated as respondent's exhibit no. 9, but he was unable to explain why Car. No. 5 emitted less noise with an untreated wrench then with a treated one (Tr. 193-203).

In response to further questions, Mr. Rowell stated that the company had at one time considered purchasing a hydraulic torque wrench to keep the work environment quieter, but did not do so because of certain safety factors. He agreed that the claimed 20 dBA noise reduction through the use of ear plugs was simply the manufacturer's claim, and that this reduction may not be accurate at the actual work locations (Tr. 212-217).

Richard Gullickson, Industrial Hygienist, testified that he has been in the respondent's employ for almost 15 years, 12 of which were as a professionally certified industrial hygieni

treated and untreated wrenches, he was familiar with the tests and the results, and in most cases the testing was done under his direction (Tr. 240).

Mr. Gullickson disagreed with MSHA Inspector McLaughlin's position that the pneumatic wrench was the primary noise source in the unloading facility. He did not believe that his measurements revealed the degree of noise reduction on the treated wrench as indicated by the MSHA inspector. Although he lacked supportive data, he advanced the notion that the longer a wrench was used, the quieter it became due to wear and refurbishing and he believed that this was why the wrenches seemed quieter after they were treated. Also, he claimed that MSHA tested different wrenches without determining what their individual noise levels were with the same treatment. Because of a possible ten decibel, or ten-fold, difference between various cars, he focused his experiments on only two cars. In some cases the treated wrench was higher in noise intensity than the untreated wrench, but he did not regard it as noisier, and thought that the contrast reflected two different wrenches with different intensities (Tr. 242-245).

With regard to MSHA's testing in May 1982, Mr. Gullickson expressed no quarrel with the scientific validity of MSHA's testing methods. However, he did express concern over the fact that the noise level measurements were made on two differen untreated wrenches which were not of the same noise levels. As an example, he cited the April 1981, test results where the lead flagman averaged 90.2 decibles and the flagman averaged 95.4, both from untreated wrenches. He believed that it was critical to test the same wrench on the same car because the cars had up to ten decibel differences in their noise, which translated to a ten-fold difference in noise energy (Tr. 249).

Mr. Gullickson rejected MSHA's contention that scientifical valid conclusions could be drawn from an experiment in which a number of wrenches were tested with a certain number of cars and then simply averaged out. He also doubted the validity of MSHA's reading of 453% with the noise dosimeter in May 1982, because measurements taken on other occasions indicated that the noise exposure index of the untreated wrenches should be higher than 200% (Tr. 251-252). With regard to the four decibel variation detected between the treated versus the untreated wre

noise. In his opinion, noise reduction down to the 90 dBA time-weighted average was not feasible using MSHA's recommendations or through any other engineering innovation. Even if all the wrenches were treated, he believed that employees would still need to wear hearing protection (Tr. 260-261).

On cross examination, Mr. Gullickson reiterated that if properly fitted and worn, personal ear protection would reduce excessive noise exposure (Tr. 265). He confirmed that ear plugs and muffs are available at the plant, and he generally discussed the noise survey studies conducted at the plant, the results of which are recorded in the reports, exhibits R-8 and R-9 (Tr. 269). In response to a hypothetical, he stated that if there were two equivalent noise sources and one was reduced by 12 dBA, the overall noise exposure would be diminished by 3 decibels, or fifty percent (Tr. 272). Even if a totally silent wrench could theoretically be designed, he believed the noise problem would not be significantly affected due to the fact that the car doors were the major source of noise (Tr. 273). He also stated that the noise exposure would be less if a car bar was used because its impact would be less than that of a wrench, but he conceded that the pneumatic wrenches did contribute to the noise level. He further testified that the 114 decibel locomotive whistle would have to sound for 15 minutes a day to be out of compliance, as opposed to an isolated ten second blast (Tr. 274-277).

Procedural ruling

As part of his post-hearing brief, petitioner's counsel included as an "Exhibit A" certain tabular compilations purportedly reporting the results of certain noise test data not previously made a part of the evidentiary hearing record. By letter filed September 9, 1983, respondent's counsel objected to the document and moved that it not be considered by me as part of my decision in this case. Subsequently, by letter filed September 23, 1983, in response to the respondent's objections petitioner's counsel withdrew the exhibit and requested that it not be considered in my decision in this case. Under the circumstances, petitioner's request to withdraw the document IS GRANTED, and I have not considered it in the course of this decision.

ment to customers, and the facility employs approximately 65 employees. The phosphate rock is unloaded from railroad hopper cars at the "dumping shed", an open-ended metal fabricat building approximately 100 feet long by 40 feet wide with a railroad track running through the center. The railroad cars are pulled through the building by a locomotive. After each car is placed at the unloading point, the material is unloaded from the bottom of the car and it drops through a grate in the floor under the cars to a belt conveyor system underneath the grate for transportation to the main plant for drying and storage.

The crew involved in the dumping or unloading process consists of three employees. The locomotive engineer is responsible for operating the locomotive to pull the railroad hopper cars into position over the dumping grates. The lead flagman assists in positioning the railroad cars over the grates, through radio communications with the engineer, and opens the hopper car doors on one side of the dumping shed. The flagman opens the railroad hopper car doors on the opposit side of the dumping shed. The flagman opens the railroad hopper car doors on the opposite side of the dumping shed opposite from the lead flagman. There are three crews available forworking three shifts, seven days a week. The number of cars dumped on any given shift vary. On the day of the inspection, the inspector stated approximately 50 cars were dumped on one shift, and respondent's witnesses estimated that on a yearly average approximately 18 to 20 cars per shift are dumped.

The lead flagman and flagman use pneumatic impact wrenches to open and close the hopper car doors having rack-an pinion mechanisms. A square "bit" on the end of a pneumatic wrench is engaged with the socket on the hopper car door pinion and the impact wrench is activated, causing the bit and pinion assembly to rotate and move the hopper car door which is attached to the rack. The doors can be opened or closed by adjusting the pneumatic wrench to rotate the bit and pinion assembly either clockwise or counter-clockwise. On some cars, a bar has to be used because the doors are not adapted for the pneumatic wrench.

The dumping shed must normally have three pneumatic wrenches in operating condition at all times. One wrench is located at the lead flagman's work station on one side of the shed and tracks; that wrench can be moved along the

Each of the pneumatic wrenches is approximately four feet high, two feet wide, and four feet long (including the bit). The pneumatic impact motor, contained in a cylindrical housing approximately two feet in length, is mounted between two rubber-tired wheels that give the wrenches their mobility. A bit-directional control rod (allowing the operator to select clockwise or counter-clockwise rotation of the bit) extends directly upward from the top of the pneumatic motor housing. The power control for the pneumatic wrench is located on the right handlebar assembly. The wrenches have approximately four inches ground clearance. Each wrench weighs approximatel 130 pounds and is connected by a long hose to an air compresso which is located outside the dumping shed. The bit of the pneumatic wrench rotates at approximately 1500 rpm when unconnected to a railroad car; under "load" conditions, that is, when connected to a railroad car door pinion socket, the wrench bit rotates at approximately 10 rpm. The wrenches do not have noise-suppression devices supplied by the manufacture (Photographs of the wrench are included as part of the record)

Inspector McLaughlin visited the Port Sutton facility on November 25 and 26, 1980. The first day was devoted to a general scheduled inspection, and after determining that the unloading area may have a noise problem, Mr. McLaughlin returned to the facility the next day and conducted a complete noise survey using dosimeters and a sound level meter. (A dosimeter measures accumulated exposure to noise over a measured period of time, while a sound level meter measures noise at any instant in time). Mr. McLaughlin calibrated the dosimeters, and properly placed them on the lead flagman and flagman who were working in the unloading shed area. The dosimeters were used to measure the noise exposure of the two employees for a full working shift, and during the course of the shift Mr. McLaughlin returned to the shed area four times to take noise level readings with the sound level meter during the opening and closing of the car doors.

The two employees sampled by dosimeter by Mr. McLaughlin on November 26, were found to be exposed to 95 dBA, which is equivalent to 201% and 203% of the allowable regulatory maximu noise exposure, or 2.01 and 2.03 times the allowable noise exposure. Mandatory standard section 55.5-50 limits employee exposure to less than 90 dBA for an eight hour duration, and

As a result of the November 26, noise sampling at t unloading area, Mr. McLaughlin issued two section 104(a) citations citing the respondent with violations of secti 55.5-50(b), and as noted earlier in this decision the ab times were extended several times and the citations fina terminated on September 1, 1981.

The respondent concedes that the two cited employee were not wearing personal hearing protection when the ci were issued, and that on that particular day, the cited working at the dumping operation were exposed to noise i excess of the regulatory maximum. Respondent also admit that it is appropriate for me to find it liable for civi penalties for the two violations, and that it cannot con the citations nor a proposed penalty assessment insofar petitioner seeks sanctions only for failure to wear pers hearing protection on November 26, 1980.

On the question of whether feasible engineering or administrative controls exist for the abatement of the n levels described in the citations, respondent takes the position that neither the noise controls that it has imp or those recommended by the petitioner are "feasible" as that term has been statutorily and judicially defined. Respondent maintains that none of the controls (whether implemented or merely recommended) have been proved effe in reducing the total noise of the unloading operation, have been shown to be economically feasible, or have su a cost-benefit analysis.

The dispute in this case arises on the question as whether the petitioner has established that feasible en controls are available to bring the respondent within c and whether or not the respondent has implemented these in good faith so as to come within the requirements of standard. Respondent takes the position that it has ac in good faith, and that it has made an attempt to imple MSHA's recommendations, as well as its own, but that th are not feasible to achieve compliance. On the other h petitioner takes the position that even though its reco as well as the actions taken by the respondent acting o own initiative, do not achieve total compliance with th standard, respondent is nonetheless obligated to implem

in excess of those permitted by the standard; (2) there are, in general, technologically feasible engineering or administrat. controls available which will reduce the noise; and (3) provide a rough estimate as to the cost of implementing the controls. Petitioner submits that it has made out a prima facie case.

Assuming that it can establish that the noise exposure measured by the inspector exceeded the allowable limits, petitioner asserts that the gravamen of the violations was that the respondent failed to institute or to attempt to instit any "feasible administrative or engineering controls to reduce noise exposure in the unloading area". Other than requiring employees to wear hearing protection, which was not done at the time of the citations, petitioner asserts that the respondei has still not instituted any controls to reduce the noise exposure. Although conceding that the respondent had modified one of its wrenches and conducted some tests, petitioner mainta that the modifications were not adopted. Petitioner advances the notion that since its studies have shown that some noise reduction has been achieved, respondent is obligated to implement them, even though they may not result in enough noise abatement to bring the respondent within the requirements of the cited standard.

At page 17 of its post-hearing brief, petitioner cites Judge Morris' decision in MSHA v. N.A. Degerstrom, 5 FMSHRC 637 April 5, 1983, in support of its argument that any feasibility consideration of noise controls to reduce employee exposure to excessive noise precludes the weighing of costs and benefits and that the phrase "feasible" should be construed to mean "capable of being done" or "achievable" without regard to whether or not any recommended controls will reduce the noise to within the permissible limits. All that is required, suggests petitioner, is that some significant reduction is achieved, regardless of whether such reduction results in total and full compliance with the requirements of section 55.5-50. In support of its argument, petitioner states that the consideration of whether the cost of a control is wholly disproportionate to the benefits does not involve a cost-benefi analysis or the kind of weighing of costs and benefits involved in such an analysis. Petitioner suggests there is no need to calculate and quantify all the conveivable costs and benefit to determine where the balance lies. Instead, it is only

in fact, promote the purposes of the regulation or statute; the regulation or statute itself embodies that determination. Petitioner asserts that the question is whether the control can be expected to achieve any significant results and whether the costs are so great that it would be irrational to require the use of the control to achieve those results.

Aside from the fact that Judge Morris' decision in N.A. Degerstrom is not binding on me, I take note of the fact that he relied on several cases decided under the Occupational Safety and Health Act, as well as the legislative history of that statute in determining the meaning and application of the phrase "feasible". He also noted that "the law on this point continues in a state of flux". In short, he relies on an interpretation by OSHRC, as further refined by the Courts to support his findings and conclusions in N.A. Degerstrom. This I decline to do.

Petitioner also relies on Judge Morris' decision in Jet Asphalt and Rock Co., 3 FMSHRC 940, April 14, 1981, where he construed section 55.5-50 as requiring the implementation of feasible controls in the event of excessive exposure regardless of whether such implementation would guarantee reduction of the noise to within the permissible levels. After review of Judge Morris' decision, my conclusion is that he simply held that a companion mandatory standard (56.5-50) requires an operator to explore the feasibility of administrative or engineering noise controls before relying on personal protective equipment, and that the mere use of ear plugs is not an absolute defense. I agree with Judge Morris' conclusion that "what I'm trying to say is that the first thing to be considered is administrative or engineeri controls", 4 FMSHRC 945. However, I reject petitioner's attempts to read anything else into his decision, and I reject any notion that section 56.5-50 permits anything less than full compliance with the clear language of the standard. The second sentence of section 56.5-50, clearly permits the use of personal protection equipment in the event feasible administrative or engineering controls fail to reduce any noise exposure to within permissible levels. The permissible levels are those stated in the standard, and the standard makes no allowances or provisions for so-called "improvements" or "near" or "close to" compliance with the required noise levels. If the Secretary wishes to change or alter the standa he is free to do so through proper rule making, but I reject his attempts to do so in this proceeding.

methods advanced by both the respondent and MSHA are proved workable, I seriously doubt that the respondent would suffer economically. As a matter of fact, at page five of its posthearing arguments, respondent states that "Although MSHA recommended noise controls are neither harmful nor costly, neither are they especially effective". Thus, the question presented is whether the engineering recommendations are cost effective. In other words, if it cannot be established through credible evidence that the implementation of the engineering methods explored in this case are feasible and realistically achievable, then respondent need not go throug needless expenditures to implement them. On the facts of this case, I believe the critical question presented is whet respondent has explored all available feasible engineering and administrative noise controls to bring it into compliance with the requirements of the cited standard. As part of the determination, I cannot conclude that the estimated costs of "treating" each of the five wrenches which respondent has available at any given time is all that critical. What is critical is whether the "treated" wrench will do the job. Petitioner suggests that it has established that the results of the "treated" wrench tests clearly establish a reduction in noise exposure and that respondent should not be allowed to abandon this partial solution to the problem simply becau it does not believe that total abatement can be achieved.

The thrust of the petitioner's case is the assertion that the May 1982, tests conducted by Mr. Antel (exhibit P-9 conclusively demonstrates an average noise reduction with the treated wrench of 4.5 dBA in closing and 5.1 dBA in open the railroad car doors. Petitioner relies on Mr. Antel's testimony that this average reduction in the noise level was shown from tests on 10 to 15 railroad cars (Tr. 72), and that dosimeter readings he took for the employee's full shift showed a reduction of 6 dBA when using the treated wrench (Tr. 64). However, a closer examination of Mr. Antel testimony reflects that some 50 cars passed through the unloading area at the time of the testing, that they varied in size and construction, that the treated and untreated wrenches were never tested on the same car doors, that measurements were only taken from 10 to 15 cars, and that the wrenches were not compared, one to the other on the same railroad car. In short, Mr. Antel conceded that his testing procedures would not attract any individual variations betwe the wrenches (Tr. 71-72). Further, when asked to explain an

Q. In your July 12, 1982 report, Petitioner's Exhibit 9, you found under similar situation that the untreated wrench generated noise 453% of the permissible dosage; is that not correct?

A. Yes.

Q. Under similar circumstances, MSHA employees obtained readings of 201, 203 and 453%. That appears to be a rather large discrepancy. Can you account for that?

A. I believe that can be accounted for due to the variables, not only in the types of cars, but also in the number of cars that, in which the wrench is used.

If I could refer back to my first visit, we witnessed about fifty cars, fifty-two cars that were being unloaded that day, but only on about half of these the wrench was used. And the othe half, they were used, the bar was used to open it. So certainly that would influence the expos the number of times the wrench was used.

Q. Then you are suggesting that to compare thos two numbers is improper?

A. I am saying that one day might vary from an day, depending on the number of cars they are opening.

Q. You are suggesting then that those figures invalid?

A. No, I am saying that those figures were val for that day.

Q. You only tested them one day? On the follo visit?

A. The follow-up visit we did one full shift,

down into the rail yard -- and I am not sure what they were doing there -- but they would come up with another string of cars.

Q. Do you know how many days per month railroad cars are normally unloaded there at Port Sutton in the shed?

A. How many days per month?

Q. Yes.

A. No, I don't.

Q. Do you know how many hours per month the employees in the dry rock unloading area are exposed to that wrench noise?

A. No.

Q. Doesn't the potential harm from any loud noise source depend on the duration of employee exposure to that noise source?

A. Yeah, I guess that would be true.

Q. Since you don't know the activities of the employees in that area, either on a daily or a monthly basis, you cannot accurately testify as to any potential harm they may suffer as a result of their exposure to the wrench noise, can you?

A. I can only testify to the findings that I observed that day.

Q. But you can't give any professional estimate as to the magnitude of potential harm to the employee can you?

A. No, I can't.

emanate from the total dumping operation at the shed, and unless this total environment is considered, concentrating on one particular piece of equipment, which may or may not be significant, would be fruitless.

While it is true that Inspector McLaughlin testified that he considered the primary source of noise exposure as "the noise being generated by the pneumatic wrench while it was engaged with the car fitting" (Tr. 22), he conceded that he performed no noise measurements to differentiate and quantify the noise produced by the wrench from noises produced by the railroad car, and he explained as follows (Tr. 23-24):

> Q. Mr. McLaughlin, you just testified that the primary noise source during the unloading operation was the pneumatic wrench. But isn't it true that you never performed tests to quantify the various noise sources?
>
> A. Explain that. What do you mean quantify?
>
> Q. You never performed any tests when you were there on that day to differentiate various noise sources in the dry rock and loading area, did you?
>
> A. Well, I did use a sound level meter while the equipment was operating, and I guess that would be a quantified measurement, would it not?
>
> Q. But you never performed a test to distinguish the noise generated by the wrench from the noise generated by the railroad car or by the fans or employees dropping lunchboxes in the shed itself, did you?
>
> A. Well, I wouldn't be interested in that.
>
> Q. Isn't it true that you cannot perform such a test using the equipment that you had there on that day?
>
> A. Yes.

composite or a totality of all the noise that these two fellows were engaged -- were exposed to during the course of a given shift?

A. Yeah, as a, as the inspector -- I am not really concerned that much which piece of equipment is making the noise, because you, in this particular case, you have got a wrench making noise, you have got steel rattling on the cars, you have got all kinds of noise. What I am interested in is what the man is being exposed to. And so it is, it is the total noise in the area.

Q. So I take it if you tested all of the available noise sources and you found that one in particular was the culprit, if I can use that word, in other words, if you were to take that particular piece of equipment out of the workers' environment and theoretically if that would bring them into compliance, that they would know what the particular noise source would be, wouldn't they?

A. Yes. If they were not using a pneumatic wrench there wouldn't be, you know, hardly any noise.

Q. Do you feel that that was the principle noise source there that was causing the problem?

A. Uh-huh.

Q. That was causing the problem?

A. It was the pneumatic wrench opening the car doors. You see, it is a combination. You have two things. You have noise from the wrench and you also have noise when it is engaged.

While it is true that Mr. Antel testified that based on his April 1981, noise survey, it was his opinion that the primary noise source "was the wrench and operating during loading and unloading of the cars" (Tr. 51). He qualified his statement by readily conceding the existence of dumping operation noise sources other than the pneumatic wrenches, and his testimony in this regard is as follows:

that time and the reverberation condition.

Q. Reverberation condition?

A. From the cars themeslves.

. . . .

So, in closing [the hopper doors], that damping of the rock is, is absent, but the walls are pretty [sic] vibrating and shake in sympathy, I suppose, to the wrench?

A. Yes. (Tr. 94-95).

* * * *

Q. (The Court) Okay, now, with that flap device over there what, what kind of noise would come from that coupling and uncoupling?

A. It was a very loose fitting on some of these cars from, I suppose, continual opening and closing, where the bit or this part of the wrench would engage and sometimes it tended to rattle and jump around (Tr. 99).

* * * *

Q. (Mr. DeMeza) Did you attempt to identify and regulate those other noise sources?

A. There was no way that, that I was able to do that, since the wrench was not operating, certainly would not excite the car and there was no other means of generating the noise from the car, other than the wrench. (Tr. 69).

Q. And when he is opening the doors, that particular wrench generates noises?

A. Yes, sir.

Q. At that point and at what other point?

A. Closing. Opening and closing.

Mr. Antel's April 1981, noise survey report (exhibit P-6), contain certain conclusions which recognize noise sources other than the wrench during the dumping operation, and these are as follows:

--- increased noise levels when car doors are closed due to the reverberant condition of the cars after the material has been removed.

--- the car shaker.

--- locomotive tramming through the building, includi the whistle.

Mr. Antel's report also states that at times, two or three cars may be emptying simultaneously, and that on occasion it may be necessary to utilize a car shaker in emptying the car. Although he did not consider the car shaker to be a major noise source at the time of his survey, he conceded that in the the shaker operating time is increased it "should be regarded as a potential problem and should be investigated". Mr. Antel notes that the shaker operated two times during his survey, and no data was collected from the locomotive cab.

In view of the foregoing, it would appear to me that Mr. Antel's noise survey included factors which were not present during the survey taken by Mr. McLaughlin to support the citations. It would seem to me that if two or three cars are being dumped simultaneously while one or more car shakers is in operation, significant noise sources other than the wrenc would be present. Yet, none of these variables are explained. The parties go through great lengths to try and explain their respective engineering methodology in support of their respective positions in this case, but it occurs to me that when one is dealing with such extremely complex matters as the noise suppression standards in issue what may work theoretically on paper may not work in the actual mine working environment.

In his report of the May 1982, noise evaluations, Mr. Ante again recognizes the fact that noises other than the wrench

to the car, "another noise source is activated", he speculated as to where these sources were located and concluded that the exact location could not be determined at the time of his survey. He also took note of the fact that the noise levels generated while opening the car doors are lower than the levels generated while closing the car doors. This fact lends support to the respondent's claim that the cars themselves contribute significantly to the overall noise exposure.

Feasible Engineering Controls

Respondent concedes that it did not follow MSHA's precise recommendations concerning the noise control measures described in the 1981 Antel Report. However, respondent has established that its tests included the use of a foam-lined metal shroud, a rubber flap extending over the wrench bit, and an exhaust muffler. Therefore, as correctly pointed out by the respondent, its attempted engineering controls were close to those recommended by MSHA and presented no significant operational differences, and Mr. Antel believed that one could expect approximately the same results from the noise controls measures implemented by the respondent as those recommended by MSHA (Tr. 93). Further, as pointed out by the respondent at page 20 of its post-hearing brief, during the abatement process MSHA never took issue with the respondent's testing (Tr. 213). As previously noted, the compliance time for both citations was extended for some ten months while both the respondent and MSHA were attempting to come up with some feasible engineering controls. The citations were then terminated "pending development of additional means of noise attenuation on this equipment which may be required at a later date". In the meantime, MSHA permitted the use of personal hearing protection, and when the inspector observed that the employees were not wearing such devices the citations followed.

With regard to the petitioner's assertion that respondent failed to accept MSHA's offer to test one of the wrenches in its laboratory, respondent explained that it could not afford to relinquish a wrench because it was required to be located at the loading site as a back-up in the event the other wrenches were down for maintenance. In the circumstances respondent's reluctance to send one of its wrenches to MSHA's laboratory for testing seems reasonable. Aside from the fact that laboratory testing is significantly different than

including a muffler, in order to test the noise reduction (Exhibit R-3). He explained the modifications in great detail (Tr. 107-11), and aside from the fact that the particular modifications had to be "customized" to the particular wrench, he encountered no particular difficulties in making the modifications (Tr. 112). However, he did speculate on certain operational and maintenance problems which he believed would be encountered, and he estimated that the total additional labor and materials to maintain five treated wrenches would amount to $19,500 annually (Tr. 119). Mr. Erickson alluded to certain complaints made by the wrench operator after it was modified (Tr. 135-136; 138), and while he confirmed that testing was conducted before and after the modifications, he had no knowledge of the test results or whether the modifications resulted in any noise improvements (Tr. 138). Mr. Erickson's concern over the increased costs for the modified wrench stemmed from the fact that it would impact on his particular budget (Tr. 142).

Mr. Antel's testimony that he had previously constructed a wrap-around muffler for use on large pneumatic drills, that the cost would be approximately $65, and that no significan maintenance or employee problems would result is not persuasive. To begin with, the wrench in question is not a drill. With regard to Mr. Antel's assertion that he would expect a noise reduction of 5 dBA in the unloading area if his "wrap around" recommendations were followed, I take note of the fact that based on the results of testing as advanced by the parties, respondent would still not be in compliance. More importantly, on the facts of this case, it seems clear to me that MSHA's preoccupation with the wrench focuses only one part of the overall noise problems which result from the total unloading operation to which the two cited employees were exposed.

Safety supervisor Rowell indicated that the railroad owns the cars, and while the respondent leases some of them, it has no control over which cars appear at the unloading facility (Tr. 183). He discounted the use of car bars to open the car doors because the use of such bars has resulted in numerous accidents (Tr. 184-187). Petitioner's counsel agreed that the respondent has no control over the cars and cannot readily modify them (Tr. 230).

130 pounds, and that the modifications added an additional 20 to 25 pounds (Tr. 168). He also testified that the add of the flap as shown on exhibit R-3 presented a visibility problem which has resulted in a misplaced wrench bit flyin off and that this is hazardous to the wrench operator (Tr. 172).

Petitioner's suggestion at Tr. 231 that one cannot te the noise levels with the wrench attached to the car so as to determine the amount of noise given off by the car and the amount of noise given off by the wrench is simply not so. The record here establishes when respondent tested th treated wrench with and without a chuck while not coupled to the car, the sound level meter indicated noise in the range of 88 to 92 dBA (exhibit R-8). The test results for the treated wrench while opening and closing the car doors reflected significant increases in the noise levels. As a matter of fact, Mr. Antel's May 1982, tests indicated the approximate same results for the treated uncoupled wre as well as for the treated wrench while coupled and used i the opening and closing of the car doors. Thus, I conclud that these test results support the respondent's assertion that the wrench in question is but one part of the noise p

Petitioner's counsel candidly admitted during the cou of the hearing in this case that the parties "came away fr those tests back in May of 1982 with a different interpret of the results" (Tr. 209). While it may be true that the testing conducted by the parties reflect a reduction in th noise levels as between the treated and treated wrenches, it seems clear to me that in the actual mine working envir compliance will not be achieved until such time as the tot noise sources are addressed. Petitioner's counsel concede that even if MSHA were to independently test the wrench, and its recommendations did not result in noise reduction, it would consider that there are no feasible engineering controls available, and the respondent would then be permi to continue providing personal ear protection to its emplo This would be considered as compliance (Tr. 228-229). Dur a bench colloquy, counsel elaborated further as follows (Tr. 229-230):

JUDGE KOUTRAS: There is always a difference of opinion as to what is feasible and what is not?

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: But theoretically, assuming that they did all that, that was necessary and that MSHA agreed that they did all that was really necessary to bring the noise level on this particular wrench down into compliance, you could isolate that from all the other noise and find that they were in compliance.

And once they put that modified wrench back into production, it could very well be that other noise sources -- let's just take the empty cars --

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: That would put them back out of compliance again? Theoretically, that could happen?

MR. WELSCH: Yes, sir.

JUDGE KOUTRAS: And then I suppose MSHA could come back and say, "Okay, listen. We have eliminated the wrench now. What we want you to do now is take these cars that you are producing and buy some rubber ones."

MR. WELSCH: I, I don't think MSHA would --

JUDGE KOUTRAS: Theoretically?

MR. WELSCH: Theoretically, yes, Your Honor. In this case, though, it is my understanding that these are the controls that MSHA recommends and at this point in time this is probably all the controls that we can recommend to abate this noise.

so as to bring the respondent into compliance. I reject petitioner's suggestion that while the engineering contr tested by MSHA and the respondent may not reduce employe exposure below the permissible limits, the respondent mu nonetheless implement them.

With respect to the question of economic feasibilit based on the record here presented, I cannot conclude th the estimated costs for the treated wrenches in question would place the respondent in dire financial need. Base on its overall resources, I cannot conclude that the exp testified to in this case are economically burdensome. However, since there is no dispute over the fact that th respondent was out of compliance and was in violation because the cited employees were not wearing personal hearing protection, and in view of my conclusions that t petitioner has not prevailed on the question of feasible engineering controls, the particular question of cost fe is not a critical factor in this case.

I further find and conclude that the respondent her acted in good faith in attempting to achieve engineering compliance through the testing of certain noise control measures similar to those suggested by MSHA, but that un the total operational noise environment at the dumping l is addressed by both MSHA and the respondent, "piecemeal consideration of the wrench in question will not achieve I also find that the respondent has established through credible testimony that its own modifications to the wre presented safety problems to the operator which outweigh any resultant noise reductions.

Feasible administrative controls

In this case, MSHA recommended the following admini controls:

1. Having the lead flagman and flagman leave the dumping shed when a trip of cars is being moved through.

3. Keeping the lead flagman and flagman outside the locomotive cab unless uncessary in the performance of their duties.

Although respondent on the one hand states that MSHA's administrative controls are not significant, it nonetheless at page 37 of its post-hearing brief "does not disagree with the wisdom of those recommendations". At page 31 of its post-hearing brief, respondent concedes further that MSHA's suggested administrative controls will, to some small degree, be effective in reducing the dumping crew's noise exposure, and that if MSHA's recommendations are followed the crew will occasionally be exposed to significant noise levels.

In addition to those administrative controls suggested by MSHA, the respondent states that one of the more common administrative noise controls, rotation of employees among various work stations of varying noise exposures to minimize the total daily noise dose, was never recommended by MSHA. Respondent assumes that MSHA accurately perceived that respondent could not implement such measures at the Port Sutto terminal because the facility's employees are solidly unionize and dumping crew jobs are subject to the "bid" system. Respon states that any assignment of a less-senior employee to a preferred position on the unloading crew would result in union grievance proceedings or double payment of employees (i.e., payment of both the senior employee who was "bumped" by rotating off the dumping crew as well as the junior employe who actually performed the work) (Tr. 166-167).

Respondent's safety supervisor Rowell testified that since the citations were issued all employees working in the unloading area are required to wear personal ear protection as a condition of continued employment (Tr. 190). He also confirmed that on any given day, employees in the unloading area would spend from 4 to 6 hours per shift in that location, and that during this time the wrenches are in operation only when the car doors are opened (Tr. 164). He confirmed further that the respondent supplies all employees with ear plugs, that any employee working in the car unloading area is require to wear them as a matter of company policy, and that the annual training for all employees includes a portion devoted to noise (Tr. 168, 187). Although Mr. Rowell alluded to the possibility of bringing in additional part-time shifts to relieve the regular unloading crews, he did not believe this would be feasible due to the added costs (Tr. 183). However, no further details or evidence was offered with respe to this suggestion.

anything in these three paragraphs that would, that would be an undue burden on the, on the Respondent in this case to comply with; wouldn't that be true? Do you agree or disagree with that? Counselor?

MR. deMEZA: It would seem so, Your Honor, although I have not discussed it with the client.

I cannot conclude from the record in this case that th respondent has established that the recommended administrat controls are not feasible. By the same token, I cannot con that the parties have established that such controls will, or have had any significant impact in reducing the noise exposure. Quite frankly, I believe that the parties have c centrated on engineering controls, and have not fully consi the impact of any possible administrative solutions to the problem. Under the circumstances, I believe that the respo has a continuing obligation to continue to explore feasible administrative controls, including those suggested during the hearing, in order to achieve full compliance with the noise requirements.

The parties are reminded that while the result of my decision in this case is to permit the respondent to use personal ear protection, as correctly stated by the petitio the use of such devices is not an absolute defense. My dec in this case focused on the pneumatic wrench, and my feasib findings are in connection with that particular piece of equipment. Respondent may not sit idly by without making a further attempts to address its noise problems at the dumpi location in question, and it has a positive duty to make good faith future efforts at achieving total noise complianc at the operation in question.

Fact of Violations

There is not dispute on the question of violation and the record supports a conclusion that the respondent is in violation of mandatory safety standard 30 CFR 55.5-50(b). Accordingly, the citations ARE AFFIRMED.

by the respondent with no previous violations of the cited standard herein, and I have considered this in the course of my penalty assessments in this case.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business.

I conclude that the respondent is a large mine operator, and the parties agree that the payment of the proposed civil penalties will not adversely affect its ability to remain in business.

Negligence

Although respondent suggests that it was unaware of any noise problems at its unloading operation, and relied on its employees to bring such problems to its attention, since it did conduct noise tests on certain other equipment, I believe it had an obligation to insure that tests were made at the unloading area as well, particularly when its own safety supervisor (Rowell) candidly admitted that the unloading area was the only real source of any potential excessive noise. In these circumstances, I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

Although there is no evidence of any specific damage to any employee as a result of excessive noise exposure, the fact is that in this case the employees were not wearing personal protective devices. Since the respondent concedes that it was out of compliance and that the two cited employees were not wearing such protective devices, they were exposed to noise above the regulatory limits. Accordingly, I conclude that the conditions cited posed a potential source of harm to the employees, and that the violations were serious.

Good Faith Compliance

I conclude that the respondent made a good faith effort to achieve compliance after the cited conditions were brought to its attention, and I have considered this in the penalties assessed by me for the two violations in question.

Citation No.	Date	30 CFR Section	Assessment
094927	11/26/80	55.5-50(b)	$180
094928	11/26/80	55.5-50(b)	180
			$360

ORDER

Respondent IS ORDERED to pay the civil penalties a by me in the amounts shown above within thirty (30) day this decision and order, and upon receipt of payment by petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Ken S. Welsch, Esq., U.S. Department of Labor, Office c Solicitor, 1371 Peachtree St., NE, Rm. 339, Atlanta, GA (Certified Mail)

Howard E. Post, International Minerals & Chemical Corp. Sanders Rd., Northbrook, IL 60062 (Certified Mail)

William B. deMeza, Jr., Esq., Holland & Knight, 406-13t West, Bradenton, FL 33305 (Certified Mail)

/slk

FALLS CHURCH, VIRGINIA 22041

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. PENN 83-3
Petitioner	:	A.C. No. 36-05018-03503
v.	:	
	:	Cumberland Mine
STEEL MINING COMPANY, INC.,	:	
Respondent	:	

DECISION

earances: Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

ore: Judge Broderick

TEMENT OF THE CASE

This proceeding involves a single citation issued June 16, 2, alleging a violation of a safeguard notice issued August 12, 0, requiring that all track haulage switches be provided with lector lights or some other means to show the direction of the tch throw. The subject citation charges a violation of 30 C.F.R. 5.1403. Respondent concedes that the violation occurred but les that it was significant and substantial and contests the unt of the penalty. Pursuant to notice, the case was heard in ontown, Pennsylvania, on June 21, 1983. Clarence D. Moats, ert W. Newhouse and Eugene W. Beck testified on behalf of titioner; Don Laurie and Mark Skiles testified on behalf of pondent. Both parties have filed posthearing briefs. Based on entire record, and considering the contentions of the parties, ake the following decision.

DINGS OF FACT

1. Respondent is the owner and operator of an underground mine in Greene County, Pennsylvania, known as the Cumberland e.

4. Between August, 1980 and August, 1982, Responde
50 violations of 30 C.F.R. § 75.1403 at the subject mine
nature of these violations is not shown in the record.
history of prior violations is not such that a penalty
appropriate should be increased because of it.

5. On August 12, 1980, a notice to Provide Safegua
issued under 30 C.F.R. § 75.1403 requiring that at the
mine all track haulage switches shall be provided with
lights, or some other means to indicate the direction o
switch throw.

6. The subject mine utilizes battery operated hau
equipment, including 5-ton and 10-ton locomotives (carr
or supplies), and smaller vehicles called jeeps or crici
locomotives have a maximum speed of about 14 miles per

7. On June 16, 1982, a reflector or other suitabl
to indicate the alignment of the track haulage switch w
provided at the switch at the number 9 crosscut 12 butt
17 Face South section of the subject mine. Citation No
was issued for a violation of the notice to provide saf

8. The track in the area cited continues beyond t
for a distance of about 200 feet. There is a battery c
station about 140 feet from the switch.

9. The violation cited was abated promptly and in

ISSUES

1. Was the violation of such nature as could sign
and substantially contribute to the cause and effect of
safety or health hazard?

2. What is the appropriate penalty for the violat

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the
Mine Safety and Health Act of 1977 in the operation of
mine, and the undersigned administrative law judge has
tion over the parties and subject matter of this procee

3. The violation found above was of such nature as could significantly and substantially contribute to the cause and ef of a mine safety or health hazard.

DISCUSSION

The hazard caused by the absence of a reflector on a swit is that the operator of a haulage vehicle might mistake the po of the switch, and by going in the "wrong" direction, jostle t occupants in the vehicle or derail the vehicle. Because low-s haulage equipment was in use in the subject mine, the injuries would not be nearly as serious as would be the case where high speed haulage equipment was involved. This limits the weight be accorded Government's Exhibit No. 2, the Report of a Fatal Mine (Haulage) Accident, which involved high speed haulage. N theless, a derailment could result in injuries of a reasonably serious nature.

Respondent contends that its haulage operators rely on observing the switches rather than the reflectors, that absent reflectors were sometimes not cited by inspectors, that reflec were often removed by employees, and that the haulage equipmen travelled so slowly that an injury was improbable even if a ve operator mistook the position of the switch.

With regard to the first contention, it is self-evident t a reflector or light is visible for a greater distance than th switch and its absence clearly could contribute to an accident The second and third contentions are irrelevant to this issue. With respect to the last contention, I accept the judgment of government inspectors that a derailment even at low speed coul result in injuries to occupants of haulage cars.

4. The violation was moderately serious.

5. The condition cited was known or should have been kno to Respondent. It resulted from Respondent's negligence.

6. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $10

ORDER

Based on the above findings of fact and conclusions of la IT IS ORDERED

2. Respondent shall within 30 days of the date of t
pay the sum of $100 for the violation found herein to hav

James A. Broderick
Administrative Law Judge

Distribution:

Matthew J. Rieder, Esq., Office of the Solicitor, U.S. De
of Labor, Room 14480 Gateway Building, 3535 Market Street
Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pitt
PA 15230 (Certified Mail)

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 4 1983

ETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
NE SAFETY AND HEALTH	:	
MINISTRATION (MSHA),	:	Docket No. PENN 83-39
Petitioner	:	A.C. No. 36-05018-03505
v.	:	
	:	Cumberland Mine
STEEL MINING COMPANY, INC.,	:	
Respondent	:	

DECISION

arances: Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

re: Judge Broderick

EMENT OF THE CASE

In the above proceeding the Secretary seeks civil penalties nine alleged violations of mandatory safety standards. Each ation was cited as significant and substantial. However, respect to Citation No. 2011904, alleging a violation of .F.R. § 75.1722, the Secretary in open court deleted the ificant and substantial designation and proposed that the ation be settled. With respect to Citation No. 2012075, ging a violation of 30 C.F.R. § 75.606, the Secretary in open t deleted the significant and substantial designation. With ect to Citation No. 2011908, alleging a violation of 30 C.F.R. .903, the Secretary moved that the citation be vacated and no lty be imposed for the cited condition. Respondent admits the remaining violations occurred, but denies that they were ificant and substantial, and contests the penalties proposed. uant to notice, the case was heard in Uniontown, Pennsylvania une 21 and June 22, 1983. Robert W. Newhouse and Clarence D. s testified on behalf of Petitioner; Robert Alan Bohach, Mark es, and Chuck Lemunyon testified on behalf of Respondent. party was afforded the opportunity to file a posthearing f. Respondent filed such a brief. Based on the entire record considering the contentions of the parties, I make the following

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. Respondent is the owner and operator of an undergro coal mine in Greene County, Pennsylvania, known as the Cumbe Mine.

2. Respondent is subject to the provisions of the Fede Mine Safety and Health Act of 1977 in its operation of the s mine and I have jurisdiction over the parties and subject ma of this proceeding.

3. Respondent is a large operator and the subject mine large mine.

4. The assessment of civil penalties in this proceedin not affect Respondent's ability to continue in business.

5. Between August 1980 and August 1982, Respondent had history of 50 paid violations of 30 C.F.R. § 75.1403, 2 viol of 30 C.F.R. § 75.601, 66 violations of 30 C.F.R. § 75.400, violations of 30 C.F.R. § 75.1106-4, 8 violations of 30 C.F. § 75.606, and 11 violations of 30 C.F.R. § 75.1722(a). This moderate history of previous violations and penalties otherw appropriate should not be increased because of it.

6. In the case of each citation involved herein, the v tion was abated promptly and in good faith.

7. Whether a cited violation is properly designated as significant and substantial violation is per se irrelevant t determination of the appropriate penalty to be assessed. Th penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

8. All of the contested violations were abated promptl in good faith.

9. The subject mine is a gassy mine and liberates over one million cubic feet of methane in a 24-hour period. Meth ignitions have occurred at the subject mine.

mpty sanding devices on haulage equipment in the subject . On September 14, 1978, a notice was issued requiring that self propelled personnel carrier should be provided with well tained sanding devices. On April 30, 1980, a notice was ed requiring that all track mounted self-propelled personnel iers and locomotives be equipped with properly installed and -maintained sanding devices, except that personnel carriers neys) which transport not more than 5 persons need not be so pped.

Citation No. 2012062, issued August 4, 1982, charges that mantrip, three sanders were empty and one was plugged with sand. (There are four sanders on the mantrip - one for each l). The mantrip had been used to transport the nine person into the section prior to the citation being issued. The s were damp in some places, there was a slight grade in some s, and people were working on the haulage. At times the rails pe wet. The mantrip had a maximum speed of 12 to 14 miles nour. It has a hand operated mechanical brake, and can also topped by reversing the directional controller.

Citation No. 2012064, also issued on August 4, 1982, charges the sanders on another mantrip were inoperative. This rip had been operated on wet track for about 400 feet because broken water line. Seven miners were transported on this rip.

Citation No. 2012073, issued on August 5, 1982, charges that ers in a seven person mantrip were empty. Although different rips were involved, the section foreman in charge of the crew g transported was the same section foreman involved in tion No. 2012062.

The purpose of requiring operating sanding devices on haulage cles is to give better traction to facilitate stopping and to d curves and climb grades at a safe speed. Although the pment is operated a low speed, a sudden stop may be necessary many reasons, e.g., persons or objects on the track, a switch a defective reflector signal. Wet tracks or ascending or ending grades may require sand for proper traction. The ure to have operative sanding equipment is likely to result in ries of a reasonably serious nature. The violations are ificant and substantial. The violations were serious and lted from Respondent's negligence. The violation charged in tion No. 2012073 was the result of aggravated negligence. Based he criteria in section 110(i) of the Act, I conclude that opriate penalties for the violations are $200, $200, and $300.

properly identified or tagged to correspond with the receptacl at the load center. The mandatory standard, which is a statut provision, requires that "disconnecting devices used to discor power from trailing cables shall be plainly marked and identif and such devices shall be equipped or designed in such a manne that it can be determined by visual observation that the power disconnected." The hazard resulting from the violation is tha someone could contact an energized cable thinking it was disco nected, or could inadvertently plug in the wrong cable. The p for the continuous miner cable and the shuttle car cable are v different in size and appearance, and could not be confused wi one another. However, there were other shuttle cars and the c connecting device for the shuttle car cables could be confused one was not properly marked and identified. The load center a the subject mine has a keying system which is a physical means prevent a plug from being inserted in the wrong receptacle. H ever, the keys are often taken off the cables, and it is not k whether keys were present on the day the citation was issued. Mechanics who work on cables are instructed to lock out the ca If a break occurs in a power lead, the power would be cut by t ground continuity check. However, it is possible to have a ba wire not cut, without interrupting the continuity.

The question whether this violation is significant and su stantial is a close one, but considering the large number of c and power conductors in the mine, and the severe consequences which might ensue (electrocution), I conclude that the violat was significant and substantial. It was a serious violation, should have been known to Respondent. Therefore, Respondent w negligent. Based on the criteria in section 110(i) of the Act conclude that an appropriate penalty for this violation is $2

CITATION NO. 2012066

This citation, issued August 4, 1982, charges a violatio 30 C.F.R. § 75.400 because of an accumulation of dry coal, fl coal dust, oil and grease in the operator's compartment, behi the electric motors for the cutting head and around the elect cables on a continuous mining machine. The machine was being trammed into a working place in the No. 4 entry at the time t citation was issued. The hazard created by this violation is these accumulations are combustible and could propagate a min fire. The methane monitor and the water sprays on the miner working properly. However, the coal that was packed around t

several shifts to accumulate. The area of the mine in which the citation was issued recorded a maximum of 0.2 percent methane on the day in question. The continuous miner motor is water cooled and has thermal strips designed to shut off the motor if it overheats.

Accumulation of combustible materials in a coal mine is like to contribute to a mine fire or explosion in a mine that liberate methane. The violation was significant and substantial. It was serious violation and resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is $300.

CITATION NO. 2012074

This citation, issued August 9, 1982, charges a violation of 30 C.F.R. § 75.1106-4 because two compressed gas cylinders were standing along the shuttle car roadway without being secured from falling.

The hazard created by this violation is that the valve could be broken or the cylinders ruptured, releasing the compressed gas causing the cylinders to become as missiles. The section was pre paring to begin a new shift. Both cylinders were in bags. The oxygen cylinder was capped and the acetylene cylinder had a reces valve. I conclude that the cylinders could have been knocked ove by a shuttle car, or other force, and could have been ruptured. one or both were ruptured, serious injuries would likely occur. conclude that the violation was significant and substantial. It a serious violation and was caused by Respondent's negligence sir it was evident to visual inspection. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is $200.

CITATION NO. 2012075

This citation, issued August 9, 1982, charges a violation of 30 C.F.R. § 75.606 because the trailing cable for a construction miner was not adequately protected to prevent damage by mobile equipment. There was evidence that the cable had been run over, but there was no visual evidence of damage to the cable and a continuity check showed no damage to the power conductors. The cable was not energized. The cable had apparently fallen from hangers along the rib.

Petitioner stated that the violation was not significant and substantial. I conclude that it was not serious. It should have been observed by Respondent, however, on a preshift examination. Based on the criteria in section 110(i) of the Act, I conclude th an appropriate penalty for this violation is $50.

1. Citation Nos. 2012062, 2012064, 2012073, 2012065 2012074 are AFFIRMED as properly charging significant and violations.

2. Citation Nos. 2011904 and 2012075 charge violati properly designated as significant and substantial.

3. Citation No. 2011908 is VACATED and the penalty is dismissed with respect to it.

4. Respondent shall within 30 days of the date of t pay the following penalties for violations found herein t occurred:

Citation		Penalty
2011904		$ 20
2012062		200
2012064		200
2012073		300
2012065		250
2012066		300
2012074		200
2012075		50
	Total	$1,520

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Matthew J. Rieder, Esq., Office of the Solicitor, U.S. De of Labor, Room 14480 Gateway Building, 3535 Market Street Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pitt PA 15230 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-224 A.C. No. 42-00165-03051
v.	:	Price River No. 3 Mine
PRICE RIVER COAL COMPANY, formerly BRAZTAH CORPORATION, Respondent	:	

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicit
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Stanley V. Litizzette, Esq., Price River Coal Company,
formerly Braztah Corporation, Helper, Utah,
for Respondent.

Before: Judge Vail

Procedural History

This case is before me upon petition for assessment of a c penalty by the Secretary of Labor pursuant to section 110(a) of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et (the "Act"). Respondent (formerly the Braztah Corporation, and the Price River Coal Company) is charged with violation of a mandatory underground coal mine safety standard, for which a citation was issued pursuant to section 104(a) of the Act. In conjunction with the citation, a withdrawal order for failure t properly abate was issued pursuant to section 104(b) of the Act Respondent duly contested the proposed penalty for the alleged violation of the safety standard. Upon notice to the parties, hearing on the merits was held in Salt Lake City, Utah. Both parties filed post-hearing briefs.

Issues

The principal issues presented in this proceeding are: (1) whether respondent was properly charged with a mine safety violation, and if so, what civil penalty is appropriate based u the criteria set forth in section 110(i) of the Act; and (2) wh respondent may now challenge a withdrawal order for respondent'

the operator in attempting to achieve rapid compliance after notification of the violation.

Stipulations

At the outset of the hearing, the parties stipulated t jurisdiction of the Mine Safety and Health Review Commissio this case, and to several facts relevant to the assessment penalties. It was agreed that: (1) respondent produces 3,2 of coal daily and employs 269 miners at the Price River No. (2) respondent would stipulate to the admissibility of a co printout (Exhibit P-7) to show the number of cited violatio occurring over a 24 month period ending on February 5, 1981 that the citation involved in this proceeding was issued; a respondent's payment of a penalty would not impair its abil continue in business.

Findings of Fact

1) Respondent owns and operates a coal mine known as River No. 3 Mine near Helper, Utah.

2) On February 2, 1981, Fred Lupo, president of the L of the United Mine Workers of America (UMWA) at the Price R 3 Mine, attended a safety meeting at the mine, and afterwar formed the mine superintendent of his concern with dirty mi Upon being informed by the mine superintendent that when th manpower was "built-up then they could spread out and do mo Lupo advised the superintendent that he believed that the d belts had existed for a long period of time and that he int notify the Mine Safety and Health Administration (MSHA) and an inspection (Tr. 75, 76).

spect the mine's belt lines. Lemon commenced his inspection on bruary 5, 1981 and was accompanied by Lupo and Victor Stuart, the ne's safety inspector.

5) Upon arriving at the No. 1 belt at the mine's Castle Gate rtal on February 5, 1981, Lemon observed accumulations of both ose coal and float coal dust in the area of the belt's second set air-lock doors, about 500 feet inby the mine portal. The coal cumulations extended a distance of 20 feet and were six inches to o feet in depth. Black deposits of float coal dust had accumulat on the floor and ribs of the same area (Tr. 29, 30, Exhibit P-6) on proceeding down the No. 1 belt to the area of the belt tail- ece, Lemon observed three belt drive rollers and the idler roller nning in loose coal accumulations which measured 13 to 32 inches depth and extended over a distance of 20 feet. In addition, ack float coal dust accumulations were again evident and extended proximately 120 feet from the tail piece in the direction of the rtal (Tr. 28, 31, 48, Exhibit P-6).

Section 103(g) provides in pertinent part as follows:

Whenever a representative of the miners or a miner in the case a coal or other mine where there is no such representative has asonable grounds to believe that a violation of this Act or a ndatory health or safety standard exists, or an imminent danger ists, such miner or representative shall have a right to obtain a mediate inspection by giving notice to the Secretary or his thorized representative of such violation or danger. Any such tice shall be reduced to writing, signed by the representative of e miners or by the miner, and a copy shall be provided the erator or his agent no later than at the time of inspection, cept that the operator or his agent shall be notified forthwith i e complaint indicates that an imminent danger exists. The name o e person giving such notice and the names of individual miners re rred to therein shall not appear in such copy or notification. on receipt of such notification, a special inspection shall be de as soon as possible to determine if such violation or danger ists in accordance with the provisions of this title. If the cretary determines that a violation or danger does not exist, he all notify the miner or representative of the miners in writing o ch determination.

8) Upon returning to the site four and a half hour
Lemon determined that the abatement was incomplete. No
had been performed, and only 80 percent of the loose coa
accumulations had been removed. Lemon then issued witho
No. 1021164 pursuant to section 104(b) of the Act (Tr. 6
Exhibit P-6). 2/

9) Four miners, a mine foreman, and Lupo completed
required abatement work within one hour, whereupon the w
order was terminated at 10:25 p.m. on February 5, 1981 (
Exhibit P-6).

10) On May 26, 1981, the Secretary filed a petitio
assessment of a civil penalty against the respondent pro
the issuance of citation No. 1021163 for a violation of
proposed a penalty of $470.00. Respondent filed an answ
16, 1981, admitting the above citation was issued on the
indicated but denying that a violation occurred. Respon

2/ Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or othe
authorized representative of the Secretary finds (1) tha
violation described in a citation issued pursuant to sub
of this section has not been totally abated within the
time as originally fixed therein or as subsequently exte
(2) that the period of time for the abatement should not
extended, he shall determine the extent of the area affe
violation and shall promptly issue an order requiring th
of such mine or his agent to immediately cause all perso
those persons referred to in subsection (c) of this sec
withdrawn from, and to be prohibited from entering, such
an authorized representative of the Secretary determines
violation has been abated.

> Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Lemon's description (both in the citation and at the hearing) of coal and float coal dust accumulations in the area of the mine's 1 belt was corroborated at the hearing by Fred Lupo.

Lemon testified that it was unlikely that the coal accumula tions he observed occurred during only one shift, but instead ha been there for at least five days. Lemon further stated that wh a belt and its rollers run in loose coal, frictional heat can provide an ignition source and result in fire. In turn, the fir may set off an explosion where float coal dust has been allowed accumulate. Both fire and mine explosions pose the threat of serious or fatal injury to miners (Tr. 32, 34, 35). In light of such alleged safety hazards, petitioner seeks to have citation N 1021163 affirmed, and a civil penalty imposed.

In contrast, respondent urges that a civil penalty be disallowed. However, while respondent generally denied petition allegation of a safety violation in its "Answer to Petition for

---

3/ Section 105(d) of the Act provides in pertinent part as foll

> If, within 30 days of receipt thereof, an operator of a coal o other mine notifies the Secretary that he intends to contest t issuance or modification of an order issued under section 104, or other citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity f a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findin of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appro priate relief.

Assessment of Civil Penalty," it failed to make any arguments at hearing or in its post-hearing brief rebutting the cited conditi of coal and float coal accumulations. Witnesses Stuart and Robe Lindsey (safety inspector and belt foreman respectively at the m did testify that the accumulations were damp. However, I find t credibility of such testimony to be weak since Lindsey also testified that he could not directly controvert Lemon's testimony that overall, the areas cited were dry (Tr. 114, 125). In view such testimony, and upon careful review of the evidence, I find that accumulations of coal and float coal dust existed in respondent's mine and that such accumulations posed a hazard of a fire and explosion occurring. Accordingly, I affirm the issuance citation No. 1021163.

Respondent further argued both at the hearing and in its pos trial brief that the abatement period set by Lemon to correct the cited condition was unreasonable. Respondent therefore reasons t withdrawal order No. 1021164 was wrongfully issued, and that as a consequence the proposed penalty at issue in this case should not assessed. In making such arguments, respondent confuses the function of this civil penalty proceeding with that involved in a "contest of order" proceeding. Section 105(d) of the Act allows a challenge of withdrawal orders, but only if the contest is filed within 30 days of the receipt of the order. 30 U.S.C. § 815(d). Se Black Diamond Coal Mining Co, 5 FMSHRC 764 (April 1983)(ALJ) at 766-767. Based on the facts in the present case, the withdrawal order was issued and served on respondent by inspector Lemon on February 5, 1981, and there is no evidence that respondent filed notice of contest challenging the order within the 30 day period a provided in section 105(d). Respondent's "contest" was initiated when it was served with a copy of MSHA's proposed civil penalty fo the violation of standard 75.400 and informed MSHA on April 6, 198 that it wished to contest citation No. 1021163 and the associated proposed penalty. Accordingly, I will not rule on the validity of the withdrawal order in the instant civil penalty case. Instead, I will decide only the affect of the withdrawal order on considerations of good faith abatement when addressing the issue of assessment of an appropriate penalty for respondent's violation of safety standards 75.400.

Penalty

ine History, Size, and Financial Status

The evidence in this case shows that respondent had a history f approximately 114 violations at the Price River No. 3 Mine over wo year period ending on February 5, 1981 (Exhibit P-7). Respon- ent stipulated that the mine employed 269 miners, produced 3,200 ons of coal daily, and that payment

d previously for violations of the same regulatory standard and aware of application of the standard to conditions in its mine 41). I therefore find that respondent's failure to maintain n belt lines and correct hazardous conditions, although provided notice of their existence, amounts to gross negligence.

ity

I find that the action of the respondent in this case titutes a serious hazard. The accumulations of coal under the l belt, in combination with significant accumulations of float dust, created a serious hazard of fire and explosion and equently the threat of serious or fatal injury to miners.

Faith

In addressing the issue of good faith abatement of a violative ition, petitioner contends that respondent's lack of good faith emonstrated by the respondent's failure to timely abate the d safety violations. The evidence of record establishes that issuance of citation No. 1021163, Lemon allowed two hours and inutes for abatement of the hazardous conditions (Exhibit P-6). returning to the site four and a half hours later, he overed that while the coal belt continued in operation, only 80% he loose coal accumulations had been removed and placed in the elway adjacent to the belt. In addition, no rock dusting had performed (Tr. 60). Lemon therefore issued a withdrawal order, shut down the belt (Exhibit P-6). The abatement work was equently completed by four miners and the mine foreman, with the stance of Lupo, within one hour, whereupon the order was inated (Tr. 64).

Respondent contends that it used diligence and good faith in an mpt to abate the alleged violation. It rejects petitioner's m that Lemon established the abatement period following a ussion with Stuart (the mine's safety inspector), during which rt allegedly indicated that two hours would be sufficient time bate the cited conditions (Tr. 35, 80). Respondent denies that a conversation took place (Tr. 126). It further contends that abatement period was unreasonable due to Lemon's issuance of her citations for conditions which also required abatement, and need to allow miners performing the abatement work a lunch k.

unreasonable in relation to activities required for the abatement. Nor does the abatement period se other cited violations. Lemon testified that while he later issu four other citations, the abatement deadline on at least two of t was set for the following day or later (Tr. 142). While Lemon established an abatement period of two hours and 40 minutes, he actually allowed four and a half hours to abate before returning inspect such activities. At that time, Lemon discovered that necessary abatement work was incomplete although the necessary manpower was apparently available to perform such duties, since up issuance of the withdrawal order, the abatement work was completed within one hour. Similar facts exist in U. S. Steel Corporation, FMSHRC 832, 844 (April 1980)(ALJ), involving contest of a citation and 104(b) withdrawal order. In that case, Administrative Law Jud Koutras found that mine management was less than diligent in achieving abatement where manpower required for abatement work was available and yet had been assigned to other duties. Again, upon issuance of a withdrawal order, abatement of a safety violation wa rapidly achieved. In light of the foregoing, and the credible evidence in this case, I find that respondent failed to make a diligent and good faith effort to achieve abatement.

Conclusions of Law

Based upon the entire record in this case, and consistent with my findings in the narrative portion of this decision, the followin conclusions of law are made:

1) Respondent violated 30 C.F.R. § 75.400 as alleged by the ecretary of Labor, and accordingly citation No. 1021163 is ffirmed.

2) Respondent failed to file a timely challenge to withdrawal rder No. 1021164 and therefore is estopped from attacking its alidity in this proceeding.

3) Based on a consideration of the criteria in section 110(i) the Act, I conclude that an appropriate penalty for the violation harged in citation No. 1021163 is $470.

thin 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

stribution:

yllis K. Caldwell, Esq., (Certified Mail), Office of the Solicito
ited States Department of Labor, 1585 Federal Building
61 Stout Street, Denver, Colorado 80294

V. Litizette, Esq., (Certified Mail), Price River Coal Company
8 South Main Street, Helper, Utah 84526

lc

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCE Docket No. PENN 81- A.C. No. 36-00917-0
v.	:	Lucerne No. 6 Mine
HELVETIA COAL COMPANY, Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solici
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner

William M. Darr, Esq., Helvetia Coal Comp
Indiana, Pennsylvania, for Respondent

Before: Judge Fauver

This proceeding was brought by the Secretary of Lab
under Section 110(a) of the Federal Mine Safety and Heal
Act of 1977, 30 U.S.C. § 801 et seq., for assessment of
civil penalty for an alleged violation of a mandatory
safety standard. The case was heard at Pittsburgh,
Pennsylvania.

Having considered the contentions of the parties an
the record as a whole, I find that the preponderance of
reliable, probative and substantial evidence establishes
following:

FINDINGS OF FACT

1. At all pertinent times Helvetia Coal Company
(Respondent) operated an underground coal mine known as
Lucerne No. 6 Mine, which produced coal for sale or use i
or substantially affecting interstate commerce.

2. On February 27, 1981, MSHA Inspector William R. ollingsworth and his supervisor, John L. Daisley, conducted n inspection at Lucerne No. 6 Mine. As they prepared to go nderground, Inspector Collingsworth noticed a discrepancy etween the lamps in the lamp rack and the metal tags on the heck-in board used to indicate who was underground. After n investigation, the inspector and his supervisor determined hat twelve miners were underground although the check-in ags corresponding to their lamp numbers were still on the heck-out board. They also found that twenty miners were ot present on the mine property although check-in tags on he check-in board indicated they were underground.

3. The inspector determined that the check-in/out oards constituted the established check-in, check-out ystem.

4. He also determined that mine management knew or should ave known of the errors in the check-in/out boards system because hey were readily observable and he observed six mine foreman nter or leave the mine without using the boards.

5. The inspector issued an order of withdrawal under ection 104(d) (2) of the Act, charging the operator with a iolation of 30 CFR 75.1715, alleging that:

> The posted established check-in check-out system was not being properly used to provide a positive identification of every person underground.

he order was terminated on March 5, 1981, after the individuals ho were listed in the order were reinstructed as to the proper se of the check-in, check-out system.

DISCUSSION WITH FURTHER FINDINGS

The main issue is whether the check-in, check-out boards ere subject to the requirements of 30 CFR 75.1715, which states:

> Each operator of a coal mine shall establish a check-in and check-out system which will provide positive identification of every person underground and will provide an accurate record of the persons in the mine kept

check-in/out system and that the check-in, check-out boar
were merely a backup for the records kept by the lamp man
and, as such, were not subject to the above regulation.
contention is not supported by the evidence. The inspect
observed at least six signs in the lamp house, each signe
by the mine foreman, which stated: "All employees, be su
to use the check-in and check-out board before you enter
mine and after you arrive outside." The evidence shows t
the check-in, check-out boards and metal tags were the pr
means of identifying miners who were underground.

The lamp records might have served as a partial chec
out system, but its primary purpose was to keep an accura
account of the miners for payroll purposes. The abbrevia
"A" was written on the lamp records to indicate that a mi
was "absent" for the day, and not to indicate that he was
not underground. If the lamp records had been the primar
identification system, the system would have been in viol
of 30 CFR 75.1715, since these records did not identify
all of the individuals who were underground. The lamp
records dealt only with miners who reported at the beginn
of a shift; they did not record individuals who entered o
left the mine after a shift began. Also, the lamp record
did not record management personnel who exited the mine.

I hold that Respondent violated 30 CFR 75.1715 by it
improper use of the check-in, check-out boards and metal
A civil penalty of $370.00 is proper in light of the stat
criteria set forth in Section 110(i), including Responden
size and compliance history and the factors of negligence
gravity and abatement. Respondent was negligent in that
violation could have been prevented by the exercise of
reasonable care. The gravity of the violation is serious
Improper use of the check-in, check-out boards and tags
could result in unnecessary delays and confusion in a min
rescue attempt and contribute to death or injury to mine
rescuers or persons caught in a mine disaster. Responden
showed good faith in promptly abating the condition afte
notice of the violation by MSHA.

Mine was subject to the provisions of the Act.

3. Respondent violated 30 CFR 75.1715 as alleged in Order No. 1042037.

Proposed findings and conclusions inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of $370.00 within 30 days from the date of this decision.

William Fauver
Administrative Law Judge

Distribution:

David T. Bush, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, Pennsylvania 19104 (Certified Mail)

William M. Darr, Esq., 655 Church Street, Indiana, Pennsylvani 15701 (Certified Mail)

United Mine Workers, 900 15th Street, N.W., Washington, D.C. 20005 (Certified Mail)

kg

ADMINISTRATION (MSHA),	:	Docket No. PENN 83-118
Petitioner	:	A.C. No. 36-06100-03506
v.	:	
	:	Solar No. 9 Mine
SOLAR FUEL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

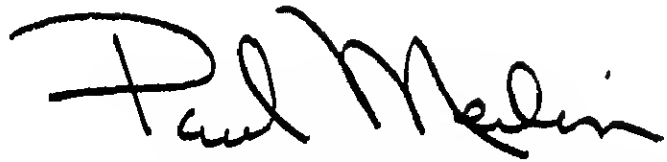
Before: Judge Merlin

In this case, the notice of contest card was signed by the operator and mailed to MSHA on March 14, 1983. On July 25 1983, the Secretary of Labor mailed a motion for leave to file late petition and a petition for assessment of civil penalty. On August 4, 1983, the operator mailed a motion for dismissal on the basis of untimely filing of the petition.

A civil penalty petition should be filed within 45 days of receipt of a timely notice of contest of a penalty. 29 C.F.R. § 2700.27(a). The Commission has held that the late filing of a petition will be accepted where the Secretary demonstrates adequate cause and where there is no showing of prejudice to the operator. Salt Lake County Road Department, 3 FMSHRC 1714 (July 28, 1981) In his motion for leave to file late petition, the Secretary states: "The assessments information and all administrative records pertaining to the case were forwarded to the Solicitor's Office by Assessments. However, the file was misplaced inadvertently and the civil penalty petition was not filed in a timely manner."

The Secretary took over four months to file a petition which should have been filed within 45 days. The only proferred excuse in this case is that the file was misplaced. This bare assertion does not constitute adequate cause. The question of whether the operator was prejudiced by the delay does not arise here because there is no showing of adequate cause. A dismissal here is unfortunate for the enforcement of the Act but I see no alternative. Hopefully, the Solicitor will exercise greater care in the future.

Accordingly, the operator's motion is Granted and this ase is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

istribution:

atherine O. Murphy, Esq., Office of the Solicitor, U. S. epartment of Labor, Rm. 14480-Gateway Building, 3535 Market treet, Philadelphia, PA 19104 (Certified Mail)

r. James L. Custer, Manager, Safety and Health, Solar Fuel ompany, P. O. Box 488, Somerset, PA 15501 (Certified ail)

October 6, 1983

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SHELBY EPERSON, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. KENT 83-38-D Jolene No. 1 Mine
v.	:	
JOLENE, INC., Respondent	:	

CORRECTIVE ORDER

Pursuant to Commission Rule 65(c), 29 CFR § 2700.65(c), the decision in this case issued September 30, 1983, is hereby corrected as follows:

1. Page 4, paragraph 3, line 1:
The word "February" is hereby corrected to read "September".

2. Page 7, paragraph 1, line 4:
The date "September 6, 1983" is hereby corrected to read "September 6, 1982".

3. Page 7, paragraph 2, line 11:
The date, "May 28, 1983" is hereby corrected to read "May 18, 1983".

Gary Melick
Assistant Chief Administrative Law Judge

Distribution (by certified mail):

Bernard Pafunda, Esq., Deskins and Pafunda, 105 1/2 Division Street, P.O. Box 799, Pikeville, KY 41501

Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203

Thomas Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA

FALLS CHURCH, VIRGINIA 22041

OCT 6 1983

MONTEREY COAL COMPANY, Contestant	:	Contest of Citation Docket No: LAKE 80-413-R Citation No. 775259; 9/11/80
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Monterey No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: LAKE 81-59 A/O No: 11-00726-03060
v.	:	No. 1 Mine
MONTEREY COAL COMPANY, Respondent	:	

DECISION

Before: Judge Moore

The above cases have been remanded to me for the purpose of assessing a penalty. Inasmuch as the Commission has already affirmed the citation, only Docket No: LAKE 81-59 is actually before me.

The parties have stipulated as to Monterey's size, history of violation, negligence, good faith and gravity. As to gravity, it is interesting to note that despite the government appellate counsel's representations to the Commission as to the safety concerns of MSHA, the assessment office assess only $100 with no points for gravity. In my opinion a penalty of $50 is appropriate.

Monterey is accordingly ORDERED to pay MSHA, within 30 days, a civil penalty in the amount of $50.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Harrison Combs, Esq., United Mine Workers of America, 900 15th Street, NW., Washington, D.C. 20005 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 82-299
	:	A.C. No. 36-00970-03502
v.	:	
	:	Maple Creek No. 1 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Thomas A. Brown, Esq., and Matthew J. Rieder, Es
Office of the Solicitor, U.S. Department of Labo
Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves six alleged violations of mandato safety standards. Each of the citations alleging the violation was denominated significant and substantial. Pursuant to notic the case was heard in Uniontown, Pennsylvania, on June 22, 1983 William R. Brown, James L. Potiseck, and Alvin R. Shade testifi for Petitioner; Dan Basile, John Pacsko, Walter J. Franczyk, ar Joseph Ritz testified for Respondent. Petitioner made a motion on the record to withdraw Citation No. 1250103 after testimony was taken concerning it. I ordered the citation vacated and wi dismiss the penalty petition with respect to that citation. Petitioner also moved to vacate Citation No. 1250106 because of insufficient evidence to establish the violation charged. I ordered the citation vacated and will dismiss the penalty petit with respect to that citation. Each party has filed a posthear brief. Based on the entire record and considering the contenti of the parties, I make the following decision.

2. Respondent is subject to the provisions of the Fe Mine Safety and Health Act of 1977 in its operation of the mine, and I have jurisdiction over the parties and subject of this proceeding.

3. The subject mine produces 541,835 tons of coal an Respondent produces 15,000,000 tons of coal annually. Res is a large operator.

4. The assessment of civil penalties in this proceed not affect Respondent's ability to continue in business.

5. In the 24-month period prior to the issuance of t tions involved herein, Respondent had a total of 673 asses lations. Of these, 11 were violations of 30 C.F.R. § 75.5 5 of 75.1003, 3 of 75.302 and 13 of 75.516. This history such that penalties otherwise appropriate should be increa because of it.

6. In the case of each citation involved herein, the was abated promptly and in good faith.

7. The subject mine is classified as a gassy mine. liberates more than one million cubic feet of methane in a period.

8. Whether a cited violation is properly labelled as significant and substantial violation is per se irrelevant determination of the appropriate penalty to be assessed. penalties hereinafter assessed are based on the criteria i section 110(i) of the Act.

CITATION NO. 1250104

This citation, charging a violation of 30 C.F.R. § 75 issued when the inspector observed a shuttle car operator a light bulb on his shuttle car. The citation alleges tha shuttle car operator was not qualified to perform electric and that he failed to lock out and tag the disconnecting d when performing the work. Changing the bulb required the of the lens and the insertion of the bulb having two prong socket having two holes. This seems to be a rather elemen but it clearly is electrical work. The inspector (and app

extremely unlikely. Following the test in the National Gypsum decision, I conclude that the violation was not significant and substantial. The violation was not serious. There is no evidence that Respondent was aware of the violation as it occurred, or that it was deficient in its training program. Therefore, the violatic was not the result of negligence. I conclude that an appropriate penalty for this violation is $30.

CITATION NO. 1205105

This citation, charging a violation of 30 C.F.R. § 75.1003, was issued because a mantrip stopped and discharged miners at an area beyond the station where the trolley bar and wire were not guarded. The trolley wire was about 6-1/2 feet above the floor. The standard requires that trolley wires be guarded at man-trip stations. The inspector stated that the mantrip went approximatel 100 feet past the regular station before stopping. Respondent's assistant mine foreman testified that it did not go beyond the station, but did admit that the mantrip may have gone "a foot or two, the length of the portal bus" beyond the station, but "I don't think the operator himself went beyond the unguarded portion." (Tr. 92). I accept the testimony of the inspector that the mantrip stopped beyond the regular mantrip station to discharg miners. I conclude that the standard is intended to prohibit such an occurrence. The hazard posed by this violation is that the trolley operator was likely to contact the energized uninsulated trolley wire. The operator had to stand to "dog" the pole, and th wire was head high. The violation was reasonably likely to result in a serious injury. Therefore, the violation was significant and substantial. It was a serious violation. The evidence does not show that the violation was the result of Respondent's negligence. I conclude that an appropriate penalty for the violation is $150.

CITATION NO. 1249389

This citation, charging a violation of 30 C.F.R. § 75.302-1(a was issued because Respondent mined a full cut of coal - 15 feet - without extending the line curtain. The standard requires that line brattice be installed at a distance of no greater than 10 fee from the area of deepest penetration. Respondent was conducting retreat mining at the time. The methane monitor on the continuous miner was working properly as were the water sprays. The area was well rockdusted. The inspector found 6,200 cubic feet of air at the face, 1,200 more than the minimum required by the ventilation plan.

that the mining machine operator told him that it was respo
practice when the last cut was involved to go 12 feet inby
curtain. The assistant mine foreman testified that the mac
operator told him that he misjudged the position of the cu
I conclude that moderate negligence was involved. I concl
$250 is an appropriate penalty for this violation.

CITATION NO. 1249546

This citation, charging a violation of 30 C.F.R. § 75
was issued because an energized power wire was hung on a w
affixed to a wooden post. The wire was insulated. There
tension on the wire, and the insulation did not appear to
damaged. The wire carried 560 to 600 volts of direct curr
inspector stated that vibrations could damage the insulati
bare the wire, which could cause a short circuit. I find,
that there was little or no tension on the wire and that d
the insulation where the wire rested on the nail was unlik
conclude that there was a violation, but it was not signif
substantial. The inspector had cited Respondent for simil
tions previously. Therefore, I conclude that the violatio
not serious, was the result of Respondent's negligence. A
priate penalty for this violation is $75.

ORDER

Based upon the above findings of fact and conclusions
IT IS ORDERED

1. Citation Nos. 1250103 and 1250106 are VACATED, an
penalty petition is DISMISSED with respect to such citatio

2. Citation Nos. 1250104 and 1249546 are AFFIRMED bu
violations were not significant and substantial.

3. Citation Nos. 1205105 and 1249389 are AFFIRMED as
and the violations were significant and substantial.

4. Respondent shall, within 30 days of the date of t
decision, pay the following civil penalties for the violat
found herein to have occurred:

1250105		150
1249389		250
1249546		75
	Total	$505

James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

UNITED MINE WORKERS OF AMERICA ON BEHALF OF LOUIS MAHOLIC, Complainant	:	DISCRIMINATION CO
	:	Docket No. PENN 8
v.	:	Russellton Mine
ANDY ONFICER AND BCNR MINING CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This case involves a discrimination complaint filed March 9, 1983 by the complainant against the respondents pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The respondents contested the allega and the matter was scheduled for a hearing in Washington, Pennsylvania, Wednesday, August 24, 1983 at 9:30 a.m. Ho ever, on the representations by complainant's counsel on August 22, 1983, that the parties had reached a settlemer the dispute, the hearing was cancelled and continued. Th UMWA now files a motion to approve the settlement.

The complainant, president of Local Union 3506, aver he was a representative of the miners for purposes of sec 103(f) of the Act, and he alleges that he was suspended b the respondent for insisting on being permitted to exerc his walkaround rights during a MSHA inspection on Septemb 1982. Although he was later allowed to return to work, h further alleges that he was threatened with suspension i he refused to work at any later date. He further states that a complaint was filed with MSHA on November 1, 1983 that by letter dated February 7, 1983, MSHA informed him that on the basis of their investigation, no violation o the anti-discrimination provisions of section 105(c) had occurred.

vents of September 24, 1982, which triggered the filing of his case have been removed from his personnel file. In ddition, the UMWA has submitted a copy of a draft letter rom mine management to Mr. Maholic informing him of this ction, as well as the assurance by mine management that it ntends to provide authorized miners' representatives with he opportunity to accompany the Secretary or his authorized epresentative during physical inspections of the mine.

Conclusion and Order

It would appear to me that this dispute has now been esolved to the mutual satisfaction of the parties. Accordingly, he UMWA's motion to approve the settlement IS GRANTED, and T IS ORDERED that this case be DISMISSED.

George A. Koutras
Administrative Law Judge

istribution:

ary Lu Jordan, Esq., UMWA, 900 15th St., NW, Washington, DC 0005 (Certified Mail)

. K. Taoras, Esq., Kitt Energy Corp., 455 Race Track Rd., .O. Box 500, Meadow Lands, PA 15347 (Certified Mail)

slk

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-86
	:	A.C. No. 36-04596-03503
v.	:	Bark Camp Strip
GLEN IRVAN CORPORATION, Respondent	:	Docket No. PENN 83-87
	:	A.C. No. 36-02391-03507
	:	Bark Camp No. 1

DECISIONS

Appearances: David Bush, Office of the Solicitor, U.S. Department of Labor, Philidelphia, Pennsylvania, for Petitioner;
Robert M. Hanak, Esq., Reynoldsville, Pennsylvani for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 14 alleged violations of certain mandatory safety standar found in Parts 50, 75, and 77, Title 30, Code of Federal Regul tions. Respondent filed timely answers and the cases were heard in Pittsburgh, Pennsylvania on July 27, 1983, along with two other cases involving these same parties which were heard that day.

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropr civil penalty that should be assessed against the respondent

(2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligen (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the cases, that the respondent has a good history of prior citation and that it is a small operator (Tr. 5; 134-137).

Discussion

During a colloquy on the record with counsel for the parties in these proceedings, it was made clear to counsel that the Secretary's Part 100 Civil Penalty Assessment regulations are not binding on the Commission or its Judges. It is also clear to me that under the Act all civil penalty proceedings docketed with the Commission and its Judges are de novo and that any penalty assessment to be levied by the Judge is a de novo determination based upon the six statutory criteria found in section 110(i) of the Act, and the evidence and information placed before him during the adjudication of the case. Sellersburg Stone Company, 5 FMSHRC 287, March 1983

The fact that the petitioner may have determined that some of the violations in issue in these proceedings are not "significant and substantial", and therefore qualify for the so-called "single penalty" assessment of $20 pursuant to section 100.4, and are not to be considered by the petitioner as part of the respondent's history of prior violations pursua

the Commission.

Section 110(i) of the Act requires Commission co of all six penalty criteria, and the fact that the Se chooses to ignore $20 citations as part of a mine ope compliance record is not controlling when the case is a Commission Judge. Accordingly, for civil penalty a purposes, I will take into consideration all previous citations by the respondent, including any "single pe $20 citations which have been paid.

In the course of the hearings in these cases, th advised me that they agreed to a proposed settlement of the citations which were originally disputed. How respect to one of the citations in PENN 83-66, No. 20 December 7, 1982, citing a violation of mandatory sta 77.1710(i), the parties advised that the alleged fact violation is in dispute and testimony from the inspec issued the citation and the respondent's safety direc offered for the record.

With regard to Docket PENN 83-87, the parties pr their arguments in support of the proposed settlement record (Tr. 88-108), including information concerning statutory criteria found in section 110(1). After co of the arguments presented in support of the proposed and pursuant to Commission Rule 30, 29 CFR 2700.30, t was approved, and the citations, initial assessments, settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment
2016781	11/15/82	75.1702	$ 20
2016783	11/15/82	75.200	46
2016784	11/15/82	75.503	20
2016785	11/16/82	75.517	79
2016787	11/17/82	75.1100-3	20
2016789	11/18/82	75.517	112
2016791	11/19/82	75.326	20
			$ 317

sment (Tr. 75-84; 86).

With regard to Citation Nos. 2000773, 2000696, 2000775, 77, and 2000778, after consideration of the arguments nted by the parties in support of their settlement proposals, ding information concerning the six statutory criteria in section 110(i), I approved the proposed settlements ring the respondent to pay the full amount of the proposed penalty assessments (Tr. 41-57). The MSHA inspector ssued the citations and the respondent's safety director both present in the courtroom and were in agreement with isposition made of these citations. The citations, al assessments, and the approved settlement amounts are llows:

ion No.	Date	30 CFR Section	Assessment	Settlement
73	12/2/82	77.409(a)	$ 20	$ 20
74	12/2/82	77.1710(i)	58	58
96	12/3/82	50.30	20	20
75	12/7/82	77.410	20	20
77	12/7/82	77.1605(a)	20	20
78	12/10/82	77.208(d)	20	20
			$ 158	$ 158

With regard to citation no. 2000776 charging a violation ndatory safety standard 77.1710(i), there is a dispute whether or not the facts and circumstances support a tion of the cited standard. The condition or practice is ibed by the inspector is as follows:

> A functional set of seat belts were not provided for the Caterpiller model D9H bulldozer SN 90 V 5229 on which roll-over protection was provided. The seat belts were not functional in that the right seat belt was not provided. The dozer was operating in pit 008 on terrain where a danger of overturning existed. The bulldozer was operating under the supervision of Orland Gray. (Emphasis added).

Section 77.1710(i) provides in pertinent part as follows:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(1) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

MSHA Inspector John Brighenti confirmed that he issued citation in question and he explained that at 9:30 a.m. when he inspected the cited bulldozer he told the operator, Merle Stewart that he wished to check the seat belts. The left part of the belt was visible, but he could not see the right part which contained the buckle. After Mr. Stewart advised him that the buckle end of the belt which was not visible was probably wedged under the seat, he and Mr. Stewa pulled up the seat, and while they both observed the remaini portion of the left side of the belt, they could not find the buckle end and Mr. Stewart exclaimed that "it is not her (Tr. 59-60). Mr. Brighenti then advised foreman Orland Gray that he was going to issue a citation because he could not see or find the missing end of the seat belt. At approximat 10:55 a.m., Mr. Gray shut the bulldozer down, and he and Mr. Stewart proceeded to work on the seat belts. Later, at 11:30 a.m., Mr. Gray approached Mr. Brighenti and advised him that "That's not a violation because the right strap was in there also" (Tr. 61). Mr. Brighenti advised Mr. Gray that since he couldn't find the missing portion of the belt when he first inspected and observed the bulldozer, as far as he was concerned the belt was not "provided" as required by section 77.1710(i), and that the violation would stand (Tr. 59-61).

In explaining why he refused to change his mind after Mr. Gray had advised him that the missing portion of the bel was finally discovered, Mr. Brighenti stated that it was probably wedged down under the seat between the final machir drives and the vehicle frame. Since he and Mr. Stewart coul not see or find it after the seat was raised, and since it obviously took Mr. Gray and Mr. Stewart approximately 35 mir to locate it, Mr. Brighenti was of the view that it was not "provided", was not functional, and was not available to the driver who should have been wearing it (Tr. 62-64). The bul was provided with rollover protection.

Respondent's defense is that the seat belt portion whic was not visible to the inspector was in fact "provided" and on the cited bulldozer, albeit it was discovered wedged under the seat after the foreman and the operator made a sea for it (Tr. 65). Since the inspector accepted the foreman's word that the missing portion of the belt was later discover and since there is no contention or evidence that the respor

Findings and Conclusions

Respondent's defense to Citation No. 2000776 IS REJECTED. On the facts of this case I conclude that the inspector acted reasonably in the circumstances. Since he and the driver could not find the buckle end of the seat belt after lifting the seat and looking for it, the inspector simply concluded that it was missing and issued the citation. Section 77.1710(i) requires the driver to wear the belt while he is operating the bulldozer, and since the driver couldn't locate one end of it after the vehicle was stopped for inspection it seems obvious to me that he was not buckled into the belt while the vehicle was being operated. Accordingly, the citation IS AFFIRMED.

The lack of a totally functional seat belt at the time the citation issued presented a reasonably serious situation which could have been avoided by the exercise of reasonable care on the part of the driver or a supervisor who should have checked the equipment out before placing it in operation. Accordingly, I conclude that the violation was serious and that it resulted from ordinary negligence. I also conclude that the respondent demonstrated good faith compliance and that the payment of a civil penalty in the amount of $58 as proposed by the petitioner will have no adverse impact on the respondent's ability to continue in business.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in Docket Nos. PENN 83-86 and PENN 83-87. Respondent is also ORDERED to pay an additional civil penalty in the amount of $58 for Citation No. 2000776 which I have affirmed in Docket No. PENN 83-86. Payment for all of the assessed violations shall be made to the petitio within thirty (30) days of the date of these decisions, and upo receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David Bush, Esq., U.S. Depart. of Labor, Office of the Solicito 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Robert M. Hanak, Esq., 311 Main St., Box 250, Reynoldsville, PA

SECRETARY OF LABOR. MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedin
	:	Docket No: KENT 83-62
	:	A/O No: 15-10062-03501
v.	:	Coal Carriers Mine
COAL CARRIERS, INC., Respondent	:	

DECISION

Before: Judge Moore

By letter of September 29, 1983 the Solicitor has advised that respondent has filed for bankruptcy and is no longer interested in contesting the citations and penaltie A copy of a letter from respondent's attorney confirms thi

This is not a settlement. It is more like a default that respondent has announced, in effect, that it would no show up at a hearing. I am therefore treating the case as would an actual default, but without the issuance of a use less show cause order.

The citations are affirmed and respondent is ordered pay to MSHA, within 30 days, a civil penalty of $336.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37202 (Certified Mail)

Mr. Byron B. Terry, Mine Consultants, Inc., P.O. Box 431, Beaver Dam, KY 42320 (Certified Mail)

Mr. William Nestor, Vice President & General Manager, Coal Carriers, Inc., P.O. Box 956, Bowling Green, KY

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 80-83
	:	A.C. No. 42-01202-03021 V
	:	Docket No. WEST 80-135
	:	A.C. No. 42-01202-03024
v.	:	
	:	Price River No. 5 Mine
PRICE RIVER COAL COMPANY, formerly BRAZTAH CORPORATION, Respondent	:	(formerly Braztah No. 5 Min

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner;
Stanley V. Litizzette, Esq., Price River Coal Company formerly Braztah Corporation, Helper, Utah, for Respondent.

Before: Judge Vail

Statement of the Cases

These cases are before me upon petition for assessment of ci penalties by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 e seq. (the "Act"). In Docket No. WEST 80-83, captioned above, respondent (Price River Coal Company, formerly Braztah Corporatio is charged with violation of safety standard 30 C.F.R. § 75.400 i citation No. 789581. The citation alleged that the violation at respondent's Price River Coal Co. No. 5 Mine (formerly Braztah No Mine) was of such a nature as could significantly and substantial contribute to the cause and effect of a mine safety hazard and th there was an unwarrantable failure on the part of respondent justifying action pursuant to section 104(d)(1) of the Act. With 90 days of the issuance of that citation, respondent was charged with an unwarrantable failure to comply with 30 C.F.R. § 75.200 i withdrawal order No. 789596, also issued pursuant to section 104(d)(1) of the Act.

In Docket No. WEST 80-135, captioned above, respondent was charged in citation No. 789961 with a safety violation pursuant t section 104(a) of the Act and 30 C.F.R. 75.1403.

a review of special findings related to the citation appropr
If the alleged violation occurred, what civil penalty should
assessed?

2) Was respondent properly charged with a violation of
standard 75.200 in a withdrawal order, and if so, may the sp
findings issued in conjunction with the charged violation a
reviewed? If the alleged violation occurred, what civil pen
properly be assessed?

3) Was respondent properly charged with violation of
standard 75.1403, and if so, what civil penalty should be as

Additional issues raised during the proceeding are ide
and disposed of where appropriate in the course of this dec

STIPULATIONS

At the outset of the hearing, the parties stipulated
facts relevant to the assessment of penalties. It was agree
(1) respondent's Price River No. 5 mine is a large operation
total number of assessed violations for the mine in the 24 m
prior to May 14, 1979 was 223; and (3) payment of penalties
impair respondent's ability to continue in business.

DOCKET NO. WEST 80-83

Citation No. 789581

On May 14, 1979, MSHA inspector Donald B. Hanna conduc
inspection of respondent's Price River Coal Co. No. 5 Mine
Braztah No. 5 Mine). During the inspection, Hanna issued c

materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

The citation also alleges that the violation was "significa and substantial."

Hanna stated in the citation that combustible materials had allowed to accumulate in the mine's 6th West working section alo the No. 1 belt. Float coal dust was deposited on rock-dusted surfaces along the operating belt conveyor which was transportin coal. The float coal dust ranged in color from gray to black, affected an area 20 feet wide in the entry and up to 40 feet wid the crosscut intersections, and extended a distance of approxima 400 feet from the belt tail-piece outby five crosscuts. In addi combustible materials, loose wood, pieces of brattice, fine dry dust and loose coal cuttings had been allowed to accumulate alon both sides of the belt conveyor. The coal dust and loose coal w approximately one inch deep in the entry, and at a depth ranging approximately two to twelve inches in the area of one side of th five crosscuts. The No. 1 belt entry had been reported dark and need of rock dusting prior to the day shift in the mine's pre-sh examination book. The report had been signed by the mine forema

---

1/ Section 104(d)(1) of the Act provides in pertinent part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a viol of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not caus imminent danger, such violation is of such nature as could signi cantly and substantially contribute to the cause and effect of a or other mine safety or health hazard, and if he finds such viol to be caused by an unwarrantable failure of such operator to com with such mandatory health or safety standards, he shall include finding in any citation given to the operator under this Act.

coal dust, was then carried by air currents and deposited at an "overcast" at the 5th crosscut (Tr. 188, 194).

The time for abatement of the conditions was set for 4:00 p.m on May 14, 1979. The abatement period was subsequently extended until 11:00 p.m. due to the extent of accumulations and abatement work required. When Hanna returned to the area at 9:05 a.m. on Ma 15, 1979, the abatement work was approved; the combustible materia had been removed, and the area had been dusted with 200 pounds of rock dust (Tr. 184, 199-200, 207, 208. Exhibit P-1). Hanna estima that it took crews of at least six men working during the day and night shift between ten and fifteen hours to abate the condition.

On December 10, 1979, the Secretary filed a petition for the assessment of a civil penalty against respondent predicated on the issuance of the citation charging violation of safety standard 75.200. The Secretary proposed a penalty of $1,000.00. Responden duly contested the proposed assessment of penalty.

Respondent failed to rebut Hanna's findings. In fact, John Patton, respondent's safety inspector who accompanied Hanna on his underground inspection of the coal mine, admitted during the heari that fine dry coal dust (varying in color from gray to black), loo coal cuttings, wood, and pieces of brattice had accumulated at spo locations in the cited area (Tr. 167-169).

Since Hanna's findings were not rebutted by respondent but instead were actually corroborated in part by respondent's own witness, I accept as fact the evidence and testimony presented by petitioner. I therefore find that respondent allowed combustible materials to accumulate in the mine's 6th West working section alo the No. 1 belt and that such accumulations constituted a violation safety standard 75.400.

I shall next address issues raised by the parties involving t special findings that such a violation was "significant and sub- stantial," and represented respondent's "unwarrantable failure" to comply with a mandatory safety standard. Such findings are necess in order to support Hanna's issuance of a citation pursuant to section 104(d)(1) of the Act. Petitioner contends that the accumulation of combustible materials constituted a "significant a substantial" violation. Hanna testified that an explosion of floa coal dust in the area of the 6th West working section along the No

He believed that the possibility of fire and explosion posed a th of serious and fatal injury to miners (Tr. 180).

Respondent denies that the accumulations of combustible materials represented a "significant and substantial" violation. Respondent in its post-hearing brief suggests that the condition not significant because the "inspector admitted that the conditi did not require shutting the production down and that it 'wasn't bad' ... p. 241." Upon reviewing the transcript, I find that Ha did not make such a statement. Instead, Hanna testified that although the condition was not an imminent danger, the float coa dust represented a serious violation having significant and substantial possibility of ignition (Tr. 109, 110).

The finding of whether a violation is "significant and substantial" depends on whether there existed a reasonable likel that the hazard contributed to or would have resulted in an inju a reasonably serious nature. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981)(ALJ). The test involves two considerations: the probability of resulting injury and the seriousness of the resulting injury. Upon analysis of the testi at the hearing and the facts surrounding the violation, I am convinced that at the time the citation involved here was issued there was a reasonable likelihood that the hazard of float coal d ignition would have resulted in serious or fatal injury to miner the area of the 6th West working section. Respondent's seeming confusion between a finding of "significant and substantial" violation and "imminent danger" does not disturb such a finding. Imminent danger is defined in the Act as "the existence of any condition or practice in a coal or other mine which could reasona be expected to cause death or serious physical harm before such condition or practice can be abated," 30 U.S.C. § 802(j), emphas added. For a hazard to be termed significant and substantial, n determination need be made that an accident may reasonably be expected to occur before the condition can be abated.

Accordingly, I conclude that the violation of standard 75.4 was "significant and substantial." A determination must next be of the issues related to Hanna's finding that the violation was result of respondent's "unwarrantable failure" to comply with th mandatory safety regulation.

The standard by which an "unwarrantable failure" is determi was established in Zeigler Coal Company, 7 IBMA 280 (1977). Tha

condition due to reports made in the mine's pre-shift book by the fire boss. Hanna testified that the violative condition along the No. 1 belt had been reported in the pre-shift book by the fire boss on the day of the inspection, and on numerous times over the period of a month (Tr. 186), 206-207, 212).

Despite Hanna's testimony citing "unwarrantable failure," the Secretary takes the position that under Windsor Power House Coal Company, 2 FMSHRC 1739 (July 1980)(ALJ) the special finding of "Unwarrantable failure" is not at issue and need not be proved in a penalty proceeding on a 104(d)(1) citation (petitioner's brief at 4).

In arguing against the finding of "unwarrantable failure," the respondent charges that the inspector based the finding only on the fact that the condition had been reported in the pre-shift book. Respondent further states that:

> Under the facts of the case there was no evidence that the operator intentionally, knowingly, or recklessly permitted accumulations of combustible materials. The mere fact that the operator was aware of the condition (emphasis added) is not sufficient to constitute an unwarrantable citation. Freeman Coal Mining case ... (respondent's brief at 2).

In addressing the arguments of the parties, I first reject petitioner's claim that a finding of "unwarrantable failure" need be proved in a penalty proceeding involving a citation issued pursuant to section 104(d)(1) of the Act. In Windsor Power, supra, Judge Melick found that the Act's provisions allow an operator to challenge the existence of a violation charged in a citation in civil penalty proceedings. However, he found no authority under the Act to consider the special findings of "significant and substantial" and "unwarrantable failure" in civil penalty proceedings; failure to timely file a notice of contest to the citation within 30 days after its receipt foreclosed the operator from challenging such special findings. 2 FMSHRC at 1741.

Federal regulation was found by the Commission to be important
the effect of such findings in triggering the possible issuance
subsequent withdrawal orders under appropriate provisions of the
Act.

In accord with the Commission decision, I therefore reject
petitioner's contention that the special finding of "unwarrantab
failure" is not at issue in the present civil penalty proceeding
Instead, I find that the charge of respondent's "unwarrantable
failure" to comply with safety standard 75.400 must be reviewed.

A finding of unwarrantable failure on respondent's part is
supported by Hanna's undisputed testimony that combustible mater
had accumulated during more than one shift. Furthermore, the
evidence shows that the violative condition had been reported at
least once in the pre-shift book prior to Hanna's inspection (Ex
R-1). Respondent did attempt to rebut Hanna's testimony that he
observed that the cited condition had been reported in the pre-s
book numerous times in the month preceding his inspection. Howe
I find such an attempt to be unsuccessful. Respondent produced
non-consecutive pages and reports from the pre-shift book, show
two pre-shift reports with no mention of the violative condition
(Exhibit R-1). However, respondent had not preserved the actual
pre-shift book. Such selective production of evidence is ineffe
in rebutting Hanna's charge that respondent had notice of the
violative condition.

I therefore conclude that respondent knew or should have kn
of the violative condition, and that it failed to correct such a
condition. Its violation of safety standard 75.400 therefore
constituted unwarrantable failure to comply with the law. In ma
such a finding, I reject respondent's claim that under Freeman C
Mining Company, 1 MSHC 1209 (December 1974), mere awareness of a
hazardous condition is not enough to constitute an "unwarrantabl
failure." Respondent misreads the cited case, which provided in
pertinent part that under the Federal Coal Mine Health and Safet
of 1969:

> The issue of "unwarrantable failure" in an "accumulation
> case presents the question of whether the operator in-
> tentionally or knowingly or recklessly permitted the ac-
> cumulation of or failed to clean up the particular mass
> of combustible materials ... It does not concern the
> question of whether the operator was at fault for not b

As previously noted at the outset of this decision, th stipulated to the mine's size, history of violations and fi status. Further criteria that need to be discussed in dete the appropriate civil penalty to be assessed are the respon negligence, the gravity of the violation, and good faith ab efforts.

In addressing the issue of negligence, I accept inspec Hanna's testimony that the combustible materials had accumu a period longer than one work shift, and that in fact Hanna that the violative conditions had been reported numerous ti the period of a month in the mines pre-shift book. In viev testimony, I conclude that respondent had adequate notice o hazardous condition and yet failed to correct it. I theref that respondent's failure to remove combustible materials a adequately rock dust in the area of the No. 1 belt amounts negligence.

The evidence in this case shows that the gravity of th violation was serious. The accumulations of combustible ma in combination with significant accumulations of float coal created a serious hazard of explosion and consequently the serious or fatal injury to miners. Safety inspector for th John Tatton, testified that in the event of an explosion, t West and 4th West crews (each consisting of approximately s people) would he involved, as well as several other mine em having duties in the area (Tr. 178, 179).

Finally, respondent demonstrated good faith in the aba the violative conditions. Two crews were assigned to perfo abatement duties and after continuous work, abatement was a within ten to fifteen hours.

On balance, I find that the penalty of $1,000.00 as pr the Secretary to be appropriate.

Withdrawal Order No. 789596

Inspector Hanna returned to the Price River Coal Co. m on June 14, 1979 (within 90 days of the issuance of citati 789581) to conduct an inspection. At 12:38 a.m., Hanna iss withdrawal order No. 789596 pursuant to section 104(d)(1) o alleging that respondent had failed unwarrantably to suppo in the areas of the No. 4 entry and the No. 3 crosscut. Se

inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds ano violation of any mandatory health or safety standard and finds su violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requirin the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to withdrawn from, and to be prohibited from entering, such area unt an authorized representative of the Secretary determines that suc violation has been abated. Specifically, Hanna cited respondent violation of 30 C.F.R. § 75.200 which provides in pertinent part follows:

> The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The order also alleges that the violation was "significant a substantial." Following abatement of the cited condition, the or was terminated on June 14, 1979.

On December 10, 1979 the Secretary filed a petition for the assessment of a civil penalty on the issuance of withdrawal order 789596 for a violation of 75.200. The Secretary proposed a penal of $1,500.00. Respondent duly contested the proposed assessment penalty. However, respondent did not file a "notice of contest" withdrawal order No. 789596, pursuant to section 105(d) of the Act. [2]/

2/ Section 105(d) of the Act provides in pertinent part as follo

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to cont the issuance or modification of an order issued under sectio 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section,

footnote continued

of 20 feet, six inches up to 23 feet wide. In addition, the No. crosscut between the No. 3 and No. 4 entries had been driven to a width of 21 feet, eight inches; and again no mine posts had been installed (Exhibit P-4). Hanna made all measurements with a star measuring tape (Tr. 279). The condition had been reported by the night shift foreman on June 13, 1979 in the mine's on-shift book (Exhibit R-3, Tr. 283). The mine foreman's report noted that the "top was working" in the area so that hydraulic jacks could not b set (Tr. 283).

While the area had been adequately roof bolted within four h after the mine foreman's report, no timbering had been performed the twelve hour interim between the time the report was made and of the inspection (Tr. 293, 295, 302, 304). Timbers were availab for installation, and installed within twenty minutes after issua of the withdrawal order.

Further unrebutted evidence presented by petitioner at the hearing established that respondent's failure to adequately suppo the roof exposed miners to the potential hazard of a roof fall (T 288). At the time of the inspection, Hanna observed signs that t pressure in the area was building up. The signs included excessi sloughage, roof fracturing, and flooring being pushed up (Tr. 287 In addition, Hanna experienced a "bounce" (quick jarring of the r and roof) while writing the citation (Tr. 286). In the event of accidental roof fall, two miners and an on-shift inspector might been exposed to serious or fatal injury (Tr. 290).

While respondent failed to rebut the Secretary's charge of hazardous roof conditions, it nevertheless urges that the withdra order be dismissed and that the proposed penalty be disallowed. support thereof, respondent claims that citation No. 789581 was invalid. As a consequence, withdrawal order No. 789596 is claime be invalid also, since the order was triggered by the citation's previous issuance pursuant to section 104(d)(1) of the Act.

Footnote 2 con't

> the reasonableness of the length of abatement time fixed in citation or modification thereof issued under section 104 . the Secretary shall immediately advise the Commission of suc notification, and the Commission shall afford an opportunity a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on find of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

proper predicate under the Act for issuance of a 104(d)(1) w
order.

I therefore turn next to the legal arguments presented
Secretary.

Petitioner contends that since this is a penalty proceed
validity of the withdrawal order is not at issue. The Secre
argues that as a consequence, the Administrative Law Judge i
to a determination of (1) the existence of a violation; (2)
the violation of standard 75.200 was "significant and substa
and (3) an appropriate penalty. The Secretary contends that
such case law as Windsor Power House Coal Company, 2 FMSHRC
(July 1980)(ALJ), respondent is estopped from contesting the
finding of "unwarrantable failure" due to its failure to tim
contest the withdrawal order (petitioner's brief at 7, 8).

Commission decisions arising under the old 1969 Act hav
established the precedent that the validity of a withdrawal
not an issue in a penalty proceeding. Pontiki Coal Corporat
FMSHRC 1476 (October 1979); Wolf Creek Collieries Company, 1
(March 1979). However, the existence of a violation it
penalty assessment are still at issue in such a case. Wheth
validity of special findings that accompany a cited violatio
also be challenged in a penalty proceeding is not so easily
To my knowledge, the Commission has not dealt squarely with
of an operator to question special findings in a penalty cas
Decisions of administrative law judges dealing with the issu
conflict. Both Windsor Power, supra, involving a 104(d)(1)
and Black Diamond Coal Mining Co., 5 FMSHRC 764 (April 1983)
involving 104(d)(1) withdrawal orders, have suggested that t
failure to contest a 104(d)(1) citation or withdrawal order
accompanied by special findings within 30 days of issuance e
operator from challenging such findings during a civil penal
proceeding. However, Administrative Law Judge Carlson held
Steel Corporation, 4 FMSHRC 1777 (September 1982)(ALJ), that
operator who fails to contest a withdrawal order issued purs
section 104(d) of the Act may nevertheless challenge the val
accompanying special findings in a subsequent penalty proceed
arising from the same violation. The judge in that case sta
"special findings are merely incidents of the violation, not
withdrawal order." 4 FMSHRC at 1786.

I accept such reasoning as a rational extension of the
Commission decision in National Gypsum, supra, which allowed
the review of special findings charged in a citation during
penalty proceeding. I therefore find CF&I Steel Corporation

Turning to the unrebutted evidence and testimony of this case, nd that the evidence establishes that substantial portions of the of in the mine's No. 4 entry and associated No. 3 crosscut were adequately supported in violation of safety standard 75.200. I rther conclude that the violation was "significant and substantial der the definition of National Gypsum, supra. The unstable and adequately supported roof made a roof fall reasonably likely. In e event of such a collapse, serious or fatal injury to miners unde e fall was almost inevitable.

I turn finally to the issue of respondent's "unwarrantable ilure" to comply with standard 75.200. "Unwarranted failure" curs where the violative condition is one of which the operator ha owledge or should have had knowledge, or which the operator failed correct through indifference or lack of reasonable care: Zeigler al, supra.

Respondent argues that under the rule of Eastern Associated Coa rporation, 3 IBMA 331 (1974), the violation charged in the thdrawal order was not caused by the operator's unwarrantable ilure, since the evidence does not show that the operator in- ntionally, knowingly, or recklessly allowed the hazardous roof ndition to exist (respondent's brief at 4). The Interior Board of ne Operations Appeals, in reviewing a violation under the 1969 deral Coal Mine Health and Safety Act, did use such criteria in scussing the requisite degree of fault necessary to support a nding of unwarrantable failure. However, the Board also cited the t's legislative history as defining unwarrantable failure as:

> ... the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part. 2 IBMA at 356.

Such a definition is not significantly different from the finition expressed in Ziegler Coal and now commonly cited in mmission decisions. Using the Ziegler Coal definition, I therefor nd that the evidence in the case before me shows that violation wa e product of respondent's "unwarranted failure" to comply with andard 75.200. It is apparent that respondent had notice of the zardous roof condition due to an on-shift report made by the night ift foreman approximately twelve hours before Hanna's inspection. though the area had stabilized sufficiently within four hours to low roof-bolting, no timbers were installed as required by the ne's approved roof plan.

The mine's size, history of violations, and financial sta were stipulated by the parties.

From the evidence, I must conclude that the operator was negligent in failing to install timbers in the cited areas of mine. Since the condition had been reported in the mine's on- book, respondent had notice of the hazard and violation, and y failed to abate it in the twelve hours preceding the inspectio therefore find that respondent's failure to correct the hazard condition amounts to gross negligence.

The evidence in the case shows that the gravity of the vi was severe. In failing to properly support the roof in the ar the No. 4 entry and associated No. 3 crosscut, respondent expo least three miners to the hazard of a roof fall. In the event such a roof fall, serious or fatal injury to the miners was hi probable.

Respondent demonstrated good faith in abating the violati condition. Timbers were installed in accord with the mine roo within twenty minutes of the issuance of the withdrawal order.

On balance, I find that the penalty of $1,500.00 as propo the Secretary is appropriate.

DOCKET NO. WEST 80-135

This case involves the issuance of a section 104(a) citat 789961 [3]/ for a violation of 30 C.F.R. § 75.1403 which provide

---

3/ Section 104(a) of the Act provides in pertinent part as fo

If, upon inspection or investigation, the Secretary or hi authorized representative believes that an operator of a coal other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulatio promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation s in writing and shall describe with particularity the nature of violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been viol In addition, the citation shall fix a reasonable time for the abatement of the violation.

75.1403-1 provides in pertinent part as follows:

> § 75.1403-1 General criteria.
>
> (a) Section 75.1403-1 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safegu may be required. (b) The authorized representative of Secretary shall in writing advise the operator of a sp safeguard which is required pursuant to § 75.1403 and fix a time in which the operator shall provide and the after maintain such safeguard. If the safeguard is no provided within the time fixed and if it is not mainta thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

The undisputed evidence establishes that Hanna inspected respondent's Price River Coal Co. No. 5 Mine on July 18, 1979 that time observed the operation of a scoop-tram without its batteries being protected by cover plates secured to the batte tray. At that time, Hanna issued citation No. 789577 pursuant standard 75.1403 as notice to respondent that Hanna was "requ that all cover-plates be secured to mobile equipment when such equipment is being operated." The condition was abated within minutes after issuance of the citation when the cover plates secured to the battery trays (Exhibit P-6).

However, upon returning to the mine on July 19, 1979, Ha observed that the scoop-tram was once again being operated wit the cover plates being secured to the battery trays. As a consequence, Hanna issued citation No. 789961. The condition abated within six minutes (Exhibit P-16). On February 4, 198 Secretary filed a petition for the assessment of a civil penal predicated on the issuance of citation No. 789961 for a violat Hanna's safety requirement issued pursuant to 30 C.F.R. § 75.1 The Secretary proposed a penalty of $305.00. Respondent duly contested the proposed assessment of penalty.

Respondent does not deny continued operation of its scoop without having secured the battery cover plates, despite havi provided with notice in citation No. 789577 that such conditi considered by Hanna to be a safety violation. Respondent does

anna nor any other inspectors had required such a practice before he issuance of the citation presently contested. In contrast, Han estified that during previous inspections of the mine, he must not ave observed the condition or he would have issued the same safety equirement (Tr. 334).

Upon reviewing such arguments, I find respondent's claim to b nsupported by case law. Generally, an operator's reliance on prio nspections does not estop the Secretary from bringing an action on ewly discovered safety violations. Midwest Minerals, Inc., 3 FMSH 51 (January 1981)(ALJ); Missouri Gravel Co., 3 FMSHRC 1465 (June 981)(ALJ); Servtex Materiala Company, 5 FMSHRC 1359 (July 1983) ALJ). I therefore conclude that the failure of previous inspectio o result in the issuance of a citation for the safety violation harged in this case does not indicate that citation No. 789961 is utomatically invalid.

Respondent further contends that the citation is invalid becau perating the scoop-tram in the area between the mine portal and th irst open crosscut without having the battery cover plates secured d not constitute a safety hazard. Such an area of the mine is laimed by respondent to be a "significant safety area" (respondent rief at 2). In contrast, Hanna testified that the unprotected attery could be damaged by a roof fall or collision while operatin n the area. Should the battery be damaged, battery acid might bur he unshielded machine operator. In addition, the batteries might urn, releasing toxic fumes and seriously or fatally injuring miner Tr. 326, 327).

Hanna also noted that in the event that the scoop-tram should ave a wreck while going down the steep incline from the portal int he mine, the unsecured covers could become flying objects causing roken bones or fatal injury (Tr. 325, 327).

I find Hanna's testimony of the hazard involved in operating t coop-tram without secured battery covers to be convincing. I herefore reject respondent's contention that citation No. 789961 i nvalid due to lack of a safety hazard.

Respondent also argued that the citation was invalid because a SHA inspector cannot write specific mandatory requirements under tandard 75.1403 and issue a citation for violation of such a equirement, but can write citations only for violations of standar pecifically stated in subsections 75.1403-2 through 75.1403-11. I ontrast, the Secretary asserts that both statutory construction an ase law support the position that an MSHA inspector can write a

that an operator provide other safeguards which are adequate to minimize hazards relating to the transportation of men and mate The standard explicitly defers to the judgment of an inspector, authorized representative of the Secretary, as to what other safeguards may be necessary. Section 75.1403-1(a) explains the regulatory scheme for the provision of safeguards. It states t 75.1403-2 through 75.1403-11 are the criteria which will guide inspector on other statutory requirements, but also states that safeguards may be required. I interpret such a statment as giv operator notice that safeguards in addition to those specifical named in 75.1403-2 through 75.1403-11.

Section 75.1403-1(b) states that the inspector must advise operator in writing "of a specific safeguard which is required pursuant to § 75.1403." Such a requirement serves to give an operator notice that a specific safeguard will be required. On after written notice to provide a safeguard has been given may inspector issue a citation (or "notice") pursuant to section 10 of the Act.

The MSHA inspector complied with the requirements of stand 75.1403 when he issued citation No. 789577 on July 18, 1979. W returned the next day and found that respondent continued to al the violative condition, he issued citation No. 789961 pursuant section 104(a) of the Act.

Prior decisions of the Commission have upheld such actions pursuant to standard 75.1403. In Consolidated Coal Company, 2 2021 (July 1980)(ALJ), Judge Cook stated as follows:

> 30 C.F.R. § 75.1403 accords substantial power to a Fede mine inspector in that it authorized him to write what in effect, mandatory safety standards on a mine-by-mine basis to minimize hazards with respect to transportatio men and materials in that mine. Failure to provide the safeguard within the time specified and the failure to maintain the safeguard thereafter renders the mine oper susceptible to the issuance of a withdrawal order and assessment of civil penalties. 30 C.F.R. § 75.1403-1(b short, the operator must comply with the requirements de facto mandatory safety standard promulgated without protections or the opportunity to submit comments affor in the rule making process applicable to the promulgati of industry wide mandatory safety standards. 2 FMSHRC 2035.

propriately be assessed. Penn Allegh Coal Company, Inc., 4 FMSHRC 18 (July 1982).

I therefore conclude, upon consideration of the undisputed idence in this case, that respondent violated the safety require- nt or notice issued by inspector Hanna pursuant to standard .1403. Accordingly, I affirm citation No. 789961.

PENALTY

Respondent stipulated that the Price River Coal Co. No. 5 Mine a large operation and had 223 assessed violations in the 24 month eceding May 14, 1979. Payment of a penalty was also stipulated as t impairing respondent's ability to continue in business.

From the evidence I conclude that respondent was negligent in lowing the scoop-tram to be operated without having cover plates cured over the battery. Since respondent was provided with notice e day before the citation's issuance that battery cover plates wer quired to be secured, it should have known of the hazard and olation. On balance, I find the degree of negligence to be derate.

Petitioner stipulated to respondent's good faith abatement of e violative condition. Respondent's good faith is further dicated by the fact that abatement was completed within twenty nutes of the citation's issuance.

Finally, I find the gravity of the violation to be moderate. though the violation may have resulted in serious or fatal injury, e number of miners exposed to the hazard appears to be limited to e machine operator and any other miners in the immediate vicinity the operation of scoop-tram.

After applying the criteria of section 110(i) of the Act to the cts of the case, I find the penalty proposed to be appropriate. erefore assess a penalty of $305.00 for respondent's violation of fety requirement issed pursuant to 30 C.F.R. 75.1403.

CONCLUSIONS OF LAW

Based upon the entire record of these consolidated cases, and nsistent with the narrative portions in this decision, the llowing conclusions of law are made:

(3) Respondent violated 30 C.F.R. § 75.200 as charged i withdrawal order No. 789596. The violation was "significant substantial" and was the result of an "unwarrantable failure" comply with the cited standard. The appropriate civil penalt the violation is $1,500.00

(4) Respondent violated a safety notice or requirement pursuant to 30 C.F.R. § 75.1403 as charged in citation No. 78 The appropriate civil penalty for the violation is $305.00.

ORDER

1. In Docket No. WEST 80-83, Citation No. 789581 and order/citation No. 789596 are affirmed and civil penalties of and $1,500 respectively are assessed against the respondent.

2. In Docket No. WEST 80-135, Citation No. 789961 is af and a civil penalty of $305 is assessed against the responden

Respondent is therefore ORDERED to pay civil penalties i total sum of $2,805.00 within forty (40) days of the date of decision.

Virgil E. Vail
Administrative Law Judge

Distribution:

Phyllis K. Caldwell, Esq., (Certified Mail), Office of the So U. S. Department of Labor, 1585 Federal Building, 1961 Stout Denver, Colorado 80294

Stanley V. Litizzette, Esq., (Certified Mail), Price River Co Helper, Utah

/blc

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. LAKE 83-57-M
v.	:	A.C. No. 20-00801-05501
NUGENT SAND COMPANY, INC., Respondent	:	Nugent Sand Mine

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On August 8, 1983, I approved settlements for three of the six violations involved in this matter and I ordered the Solicitor to submit additional evidence with respect to the remaining three. On August 31, 1983, I issued a further order to the Solicitor to submit information. Such information now has been submitted.

After a review of the Solicitor's latest motion, I am unable to approve the proposed settlements of $20 each. According to the Solicitor Citation 2088974, which was issued for failure to have a fire extinguisher on a front-end loader, involved a moderate degree of negligence because the employer was aware that a fire extinguisher was required. This factor alone would militate against a $20 penalty. With respect to gravity the Solicitor states as follows: "An injury would have been unlikely because if a fire were to occur, the employee could jump out of the front-end loader." The Solicitor further states in this respect "The type of an injury, if one were to occur, would not have resulted in any lost workdays. The type of injury contemplated would be sprains or cuts from jumping off the front-end loader."

I must reject the Solicitor's representations. The fact that the violation might force an individual to jump out of the front-end loader is to me on its face a very serious matter. There is no support for the Solicitor's assertion that the type of injury contemplated would be only a sprain or cuts.

I have no alternative, therefore, but to take appropriate action to have this item set for hearing.

militates against a $20 penalty. Moreover, I am unab
accept the Solicitor's assertion there was no likelih
injury because employees seldom travel in the area.
I able to accept his representation that the type of
would not be in the form of a hand amputation but rat
only in the form of a cut or a bruise when performing
maintenance duties. It may be that although the conv
supposed to be idle when maintenance is performed, it
be started up accidentally and the resultant injury c
very serious indeed. These matters should be resolve
hearing.

Accordingly, I have no alternative, therefore, b
take appropriate action to have these items set for h

This case is hereby assigned to Administrative L
Judge James A. Broderick.

All future communications regarding this case sh
addressed to Judge Broderick at the following address

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Jud

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S.
ment of Labor, 230 South Dearborn Street, 8th Floor,
IL 60604 (Certified Mail)

Mr. Robert Chandonnet, Vice President, The Nugent San
Company, Inc., P. O. Box 1209, Muskegon, MI 49443
(Certified Mail)

/ln

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-80-M
	:	A.C. No. 20-00038-05504
v.	:	
	:	Medusa Cement Company Plant
MEDUSA CEMENT COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On August 31, 1983, I disapproved the Solicitor's motion to approve a settlement for the one violation in this case for the original assessment of $56. I described the circumstances as follows:

> Citation No. 2089073 was issued for a violation of 30 C.F.R. § 56.16-6 because the covers on oxygen and acetylene cylinders being transported were not in place to protect the stems of the cylinders. The Solicitor states that the operator demonstrated no negligence but he gives no basis for this assertion. The Solicitor further states that the violation was significant and substantial but again he gives no reasons. I note that the inspector stated on the citation that falling materials from the conveyors could easily strike one of the stems and create a serious hazard. The inspector checked boxes indicating occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty.

The Solicitor now has filed an amended motion in which he advises that the operator demonstrated no negligence because it was not aware of the violation. I cannot accept this representation. Even if the operator was not actually aware of the violation the possibility that it should have been aware, must be explored.

injuring an employee.

(c) The type of injury that would result is that an employee could lose a day or more of work or be restricted in his job duties. The reason is that a cylinder acting with the force of a "torpedo" is a serious hazard which would cause serious injury to an employee.

When the Solicitor paints a picture of potential grievous bodily harm, as he has done here, I do not believe a penal of $56 is appropriate unless some other compelling circumstances are present.

Moreover, the Solicitor has advised that Crane Compan which owns Medusa Cement Company had 1,768,760 hours worke in all of its mines prior to the issuance of this citation and the Medusa Cement Company had 239,900 hours worked in the same period. The proposed penalty therefore, is incon sistent with the operator's size in light of the other circumstances already set forth.

Accordingly, I have no alternative but to take appropriate action to have this matter set for hearing.

This case is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

/ln

OCT 11 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 82-300
	:	A.C. No. 36-03425-03501
v.	:	
	:	Docket No. PENN 83-44
U.S. STEEL MINING COMPANY, INC., Respondent	:	A.C. No. 36-03425-03506
	:	
	:	Docket No. PENN 82-322
	:	A.C. No. 36-03425-03504
	:	
	:	Maple Creek No. 2 Mine

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above dockets were heard separately but are hereby co idated for the purpose of this decision. They all involve the Maple Creek No. 2 Mine. Two citations are involved in Docket PENN 82-300, two in PENN 83-44, and four in PENN 82-322. Pursu to notice, the cases were heard in Uniontown, Pennsylvania, on June 22 and June 23, 1983. Alvin L. Shade and Francis E. Wehr testified on behalf of Petitioner; David Coffman, Ronald Hartz and Paul H. Shipley testified on behalf of Respondent. Both p filed posthearing briefs. Based on the entire record and cons ing the contentions of the parties, I make the following decis

FINDINGS AND CONCLUSIONS COMMON TO ALL DOCKETS

1. At all times pertinent to these proceedings, Respond the owner and operator of an underground coal mine in Washingt County, Pennsylvania, known as the Maple Creek No. 2 Mine.

3. The subject mine has an annual production of 872,848 of coal. Respondent has an annual production of 15,046,082 to Respondent is a large operator.

4. The assessment of civil penalties in these proceeding will not affect Respondent's ability to continue in business.

5. The subject mine had a total of 530 assessed violatio for the 24 months prior to the issuance of the citations invol herein. Ninety one were violations of 30 C.F.R. § 75.503, 20 75.516, 72 of 75.200, 11 of 75.515 and 47 of 75.1403. An unkn number of the violations of 75.516 had the significant and sub stantial designation removed after their issuance, and Respond objects to their being included in the history of prior violat

6. In the case of each citation involved herein, the vio tion was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

DOCKET NO. PENN 82-300

The two citations involved in this docket both charge per sibility violations (30 C.F.R. § 75.503). In one case, the cc was pulled away from the packing gland on the headlight to the continuous mining machine and the junction box was loose. In other, the conduit was pulled away from the packing gland on t switch for the deenergizing bar. Both citations were issued c ing significant and substantial violations, but at the hearing counsel for the Secretary moved to delete the significant and substantial designation from both citations. No bare wires we seen, but if the wire is pulled from the conduit, it could be or cut to create a spark. However, the headlight is guarded a such an occurrence is unlikely. The same is true of the condu the deenergizing bar. The violations were not serious. Respo has been cited for this violation on a number of occasions. T fore, I conclude that the violations resulted from its neglige I conclude that an appropriate penalty for each of these viola is $50.

which the insulation had been broken off or had worn off. The wire was not bare or damaged. The mine was idle and had been id for about 2 months when the citation was issued. The system is protected by a 10 ampere fuse. I conclude that the violation wa unlikely to cause an injury. Therefore, it was not significant and substantial. Respondent had been cited for this same condition previously, and should have been aware of it. I conclude that an appropriate penalty for this violation is $50.

2. Citation No. 2011267, issued September 9, 1982, charges a violation of 30 C.F.R. § 75.504 because the conduit was pulled out of the packing gland on the continuous miner headlight. The citation originally charged a significant and substantial violation, but at the hearing, Petitioner moved to delete the signifi cant and substantial designation. The inspector testified that a hazard was unlikely. I conclude that the violation was not serious. Respondent has been cited for this violation on many occasions and therefore, I conclude that the violation resulted from its negligence. I conclude that an appropriate penalty for this violation is $50.

DOCKET NO. PENN 82-322

1. Citation No. 829652, issued June 18, 1982, charges a violation of 30 C.F.R. § 75.200, in that two roof bolts were mis ing in an area along the track haulage. The bolts had been installed but apparently had fallen out of the roof. There was a slip in the roof and the roof was loose and drummy. The roof bolts were not on the floor when the citation was issued, leadin to the conclusion that they might have been out for a period of time. The inspector testified that one missing bolt was on the "tight" side over the trolley wire and the other over the center of the track. The section foreman testified that both had been located on the tight side. In any event, there was an area of unsupported roof, making a roof fall reasonably likely. Such an occurrence would likely result in serious injuries to miners. I conclude that the violation was significant and substantial. Th condition should have been known to Respondent despite the fact that it is permitted to do the preshift examination by jeep whic makes it difficult to spot all the roof areas. Therefore, the violation was caused by Respondent's negligence. I conclude tha an appropriate penalty for this violation is $200.

the wire in the absence of bushing. This could result in the p
to become the ground and, if the circuit protection failed, any
touching the pump could be shocked or electrocuted. I conclude
that the violation made such an occurrence reasonably likely.
Therefore, it was significant and substantial. Respondent had
been cited several times for similar violations. I conclude th
this violation was the result of its negligence. I conclude th
an appropriate penalty for this violation is $125.

3. Citation Nos. 829654 and 829656 were issued on June 18
and June 21, 1982. Each charges a violation of 30 C.F.R. § 75.
(notice to provide safeguards) because track haulage switches w
not provided with reflectors to show the alignment of the switc

The hazard caused by the absence of a reflector on a switc
is that the operator of a haulage vehicle might mistake the pos
tion of the switch, and by going in the "wrong" direction, jost
the occupants in the vehicle or derail the vehicle. Because
low-speed haulage equipment was in use in the subject mine, the
injuries would not be nearly as serious as would be the case wh
high speed haulage equipment was involved. This limits the wei
to be accorded Government's Exhibit No. 6, the Report of a Fata
Coal Mine (Haulage) Accident, which involved high speed haulage
Nevertheless, a derailment could result in injuries of a reason
serious nature. I conclude that the violations were significan
and substantial. They were moderately serious, and the conditi
was known or should have been known to Respondent. I conclude
appropriate penalties for each of these violations is $100.

ORDER

1. Citation Nos. 1249544, 1249549, 2011263, and 2011267
charge violations not properly designated as significant and
substantial.

2. Citation Nos. 829652, 829653, 829654, and 829656 are
AFFIRMED as properly charging significant and substantial
violations.

1249544		$ 50
1249548		50
2011263		50
2011267		50
829652		200
829653		125
829654		100
829656		100
	Total	$725

James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

LITTLE SANDY COAL SALES, INC. Contestant	:	NOTICE OF CONTEST
	:	Docket No: KENT 83-178-R
v.	:	Order No: 2053590; 3/18/
	:	
	:	No. 1 Tipple
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicito
U.S. Department of Labor, 4015 Wilson Bouleva
Arlington, Va, for Respondent;

Before: Judge Moore

This case was set for hearing in Pikeville, Kentucky, o September 8, 1983, at 10:00 A.M. After arriving in the Pike area on September 7, I received a call from my secretary sta that Mr. Everman, owner of Little Sandy Coal Sales, Inc. the contestant, was ill and could not attend the hearing on the ing day. Mr. Everman left two numbers at which he could be One was his office number and the other was his home number he announced to my secretary that he would be at the home nu after 4:00 P.M.

On the following day, after several inspectors, the Solicitor's attorney, and I had arrived at the hearing site and waited until twenty minutes after 10:00 A.M. for Mr. Ev to appear, I called my secretary and asked her to get in to with Mr. Everman. My secretary called Mr. Everman's office was informed that he was not there at the time but was expe She then called Mr. Everman's home and let the phone ring 9 times; there was no answer.

Mr. Everman had requested an expedited hearing in this case and it appeared that Mr. Fitch and the inspectors had tried to accommodate Mr.Everman in reaching a speedy deter- mination as to whether his operation was a mine, subject to the Federal Mine Safety and Health Act. In fact, the inspe have extended the abatement time of other citations so that Mr. Everman will not have to litigate those citations until a determination has been made as to the legal status of his operation. I think Mr. Everman owed the government a littl more than a last-minute call to my office saying that he

ified the exhibits and described the Little Sandy Coal Sales operation. In short, the company buys raw coal, puts it through a crusher, refines it by screen into 3 sizes and then sells the coal. I asked the inspector how this operation differed from that of a normal tipple. His answer was that in the typical tipple which is not located at a mine itself, the tipple operator does not own the coal. He crushes and sizes somebody else's coal, whereas Mr. Everman buys the coal, processes it and then sells it.

Mr. Everman telephoned me as soon as I got back to our Virginia office and apologized for not attending the hearing. He said he would get a doctor's certificate showing that he was too ill to participate in the hearing. I told him that if he would send me that doctor's certificate I would allow him to submit further evidence but that I would not re-convene the hearing to allow him to cross-examine the MSHA inspector. He said that he would like to submit some material but that he would like to look at the transcript first. I then transferred the call to my secretary, who gave him the necessary information concerning the court reporter.

Whether Mr. Everman changed his mind about the copy of the transcript or managed to get one before one was delivered to this office, I don't know. But he did submit a substantial amount of information (similar to a brief) on September 26, 1983. Attached was a note from Dr. Shufflebarger which said "Mr. Everman was unable to attend due to illness." In the circumstances, I hold the excuse insufficient to justify Mr. Everman's failure to appear at the hearing. The note does not say what was wrong with Mr. Everman, or how ill he was. And he was well enough to be in his office. I will nevertheless, consider the material he submitted.

In the handwritten portion of his submission, Mr. Everman makes a number of important points. He compares his operation to that of the Allied Chemical plant in Ashland, Kentucky, which is considered by MSHA as a coke manufacturing plant and not a mine. The plant receives coal by rail, grinds it to the proper size to make coke to be shipped to various customers. At his plant, Mr. Everman says, he takes coal "and manufactures stoker".

ever, involves the case of Secretary of Labor vs. Oliver M. Elam, Jr. Company, 4 FMSHRC 5, (January 7, 1982). Elam's operation is quite similar to that of Little Sandy. Elam got paid for loading coal that it did not own on to barges that it did not own. Some coal was loaded directly on to the barges by conveyor belts, but other pieces of coal were too big and had to be run through a crusher in order to fit on the covered conveyor belts. Little Sandy, on the other hand, owns the coal it processes, and the crushing, sizing and loading is to make the coal marketable and not just so that it will fit his conveyors. It is a small difference but it is enough. Secretary of Labor v. Alexander Brothers, Inc. 4 FMSHRC 541 (April 5, 1982).

I sympathize with Mr. Everman. I hope this decision does not put him out of business as he claims it will, and I hope he takes an appeal to the Commission for a final determination.

I reject all of Mr. Everman's arguments to the effect that the facts, as related by him, as well as by the inspector, indicate that he is not a mine operator. I find that the violation occurred, that the operation is covered by the Federal Mine Safety and Health Act, and I accordingly AFFIRM the citation for failure to have sanitary toilet facilities.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Edgar Everman, Little Sandy Coal Sales, Inc., P.O.Box 335, Grayson, KY 41143 (Certified Mail)

/db

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
Petitioner	:	Docket No. WEST 82-1-M MSHA Case No. 42-01689-05003
v.	:	
AMERICAN MINE SERVICES, INC.,	:	LaSal No. 2 Mine
Respondent	:	

AMENDMENT OF DECISION

The decision issued in the above captioned matter on September 30, 1983, is hereby AMENDED to reflect that the civil penalty assessed for citation 583964 is "$78.00" rather than "$87.00." Likewise, on page six of the decision, all reference to a penalty sum of "$87.00" are AMENDED to reflect "$78.00."

In all other respects, the decision remains the same.

John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., (Certified Mail),
Office of the Solicitor,
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294

Mr. Morris E. Friberg, (Certified Mail),
American Mine Services, Inc.
4705 Paris Street, Denver, Colorado 80239

/ot

EDWIN WEBBER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 82-195-DM
v.	:	
HARRISON WESTERN CORP., Respondent	:	

DECISION

Appearances: Terris & Sunderland, Washington, D.C., Attorneys for Complainant; Dennis J. Conroy, Esq., Watkiss & Campbell, Salt Lake City, Utah, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Salt Lake City, Utah in May 1983. After trial and entry of a tentative bench decision in favor of complainant, the parties moved for approval of a stipulation for settlement. 1/ Based on a consideration of the circumstances set forth in the trial record, the tentative decision and the parties stipulation, I find the settlement proposed is in the best interest of complainant and in accord with the remedial purposes of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator forthwith pay the sum of $22,000 to complain Edwin K. Webber, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

1/ Because the complainant appeared at the trial pro se, the presiding judge assumed responsibility for fully developi the record. See Heckler v. Campbell, ___ U.S. ___, 51 L.W. 4561, 4564, n. 1, 76 L. Ed. 2d 66, 77, n. 1; Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1051-

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 83-137
	:	A.C. No. 15-11408-03510
v.	:	
	:	Pride Mine
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; William M. Craft, Assistant Director of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," in which the Secretary charges the Pyro Mining Company (Pyro) with three violations of mandatory regulations. The general issues before me are whether Pyro has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violations.

CITATION NO. 2074459 At hearing, the Secretary moved to amend its petition by seeking to withdraw this citation for lack of evidence. The Secretary now concedes that the cited explosives in fact had not been stored in the working place as alleged. Under the circumstances there appears to have been no violation of the cited standard and the motion for amendment and withdrawal is granted. Commission Rule 11, 29 C.F.R. § 2700.11.

CITATION NO. 2074458 This citation, issued by MSHA Inspector Ronald Oglesby pursuant to section 104(a) of the Act, initially alleged a violation of the standard at 30 C.F.R. § 75.523. The standard which tracks the enabling language at 30 U.S.C. § 865(r), provides that "[a]n authorized

The citation clearly does not charge a violation of the cited regulation and, indeed, it is difficult to conceive of any factual circumstance that would constitute a violation of the regulation. As explained by Inspector Oglesby at hearing, the reference in the citation to the standard at 30 C.F.R § 523 was erroneous and he meant to charge a violation under the standard at 30 C.F.R. § 75.523-2(b). The Secretary declined, however, to amend the citation to comport with this intent. The undersigned therefore issued on July 29, 1983, a notice of intent to modify the citation pursuant to section 105(d) of the Act to charge that the standard violated was 30 C.F.R § 75.523-2(b) and not 30 C.F.R. § 75.523. See also Rule 15(b) Federal Rules of Civil Procedure and United States v. Stephen Brothers Line, 384 F.2d 118, 124 (5th cir. 1967). In accordance with the notification to the parties of this intended action, the parties were given additional opportunity for hearing and/or to present additional evidence. International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977).

The operator did in fact submit additional evidence and argument by letter dated August 1, 1983. The Secretary declined to submit any additional evidence and indicated that he had no objection to either the proffered evidence or to the action contemplated by the undersigned judge. Accordingly, at this time Citation No. 2074458 is modified to reflect that it charges a violation of the standard at 30 C.F.R. § 75.523-2(b). Secretary v. Consolidation Coal Company, 4 FMSHRC 1791 (1982).

The standard at 30 C.F.R. § 75.523-2(b) provides that "[t]he existing emergency stop switch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenerization of the tramming motors of self-propell electric face equipment from all locations from which the equipment can be operated."

Pyro does not disagree that the panic bar on the roof bolter was broken as alleged but argues that the cited roof bolter was not "electric face equipment" within the meaning of the MSHA Electrical Manual. The manual defines "electric face equipment" as electrical equipment that is "installed, taken into, or used in or inby the last open crosscut." The definitions found in the MSHA manuals are not officially promulgated, however, and are not binding upon the Commission or its judges, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), Old Ben Coal Company, 2 FMSHRC 2806 (1980). In any event even under the definition of "electric face equipment" found in the cited MSHA Manual there would nevertheless have been a violation of the cited standard in this case. The uncontradicted testimony of Inspector Oglesby was that, when cited, the roof bolter was located in the last open crosscut.

I also note that in the case of Secretary v. Solar Fuel Company, 3 FMSHRC 1384 (1981), the Commission held that "equipment which is taken or used inby the last open crosscut" means equipment habitually used or intended for use inby regardless of whether it is located inby or outby when inspected. The Commission emphasized in Solar Fuel that it is not where the equipment is located at the time of inspection that is important, but whether it is equipment which can be taken or used "inby." Accordingly, since the roof bolter here cited is without question equipment that can be taken or used inby the last open crosscut it is clear that the violation is proven as charged in the amended citation.[1] Whether that violation was "significant and substantial," however, depends on whether, based on the

[1] The operator also contends in a letter dated August 1, 1983, that the Secretary failed to prove the degree of pressure applied to the cited panic bar and the distance the bar was moved in accordance with 30 C.F.R. § 75.523-2(c). The alleged deficiency is irrelevant, however, inasmuch as no violation of 30 C.F.R. § 75.523-2(c) has been alleged.

tions, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. I accept the undisputed testimony of Inspector Oglesby concerning this issue. In particular, he testified that in the absence of a functioning "panic bar" a machine operator or other person could be pushed and pinned against the coal ribs and, if unable to actuate the panic bar, could easily be crushed. Oglesby testified about past incidents of crushed legs and fatalities resulting from such a defect. Indeed there had been four accidents since 1978 at the Pyro Mines alone involving equipment pushing miners into the ribs, resulting in crushed lower extremeties, broken bones and, in one case, permanent disability. The violation was accordingly "significant and substantial." For the same reasons the violation was one of high gravity.

Donald Lamb, an official of Pyro admittedly knew that operative panic bars were required on his roof bolters and acknowledged that the operator had been cited previously for similar problems with the panic bars. The operator accordingly should have been on particular notice of this recurring problem and may be charged under the circumstances with negligence in failing to discover the broken panic bar.

CITATION NO. 2075863 This citation alleges a violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and reads as follows:

> The roof control plan dated 8/10/82 was not being followed on No. 3 unit (ID004) in that a three way place was observed. The first cut had been taken out of right and left crosscuts and face also had been cut and loaded. Cuts 1 and 2 were extracted and roof had not been supported before the face was extracted. Plan states (page 16) that 1 and 2 are to be bolted before the face areas cut and loaded. Roof bolter was in area at time of inspection pinning No. 2 crosscut.

The cited portion of the roof control plan consists of a diagram (attached hereto as Appendix A) with an explanation reading as follows: "Cuts No. 1 and No. 2 will be extracted and the roof supported, then on the next

tion on that date, Pyles observed that three cuts had been taken on the No. 3 unit. The right and left crosscuts and the face had all been cut to a depth of 9 feet and loaded out. The cuts had not yet been bolted although a roof bolter was beginning to bolt the No. 2 crosscut. Since this evidence is not disputed it is apparent that the roof control plan has been violated as alleged. The operator nevertheless argues that a violation of the roof control plan would exist only if miners are actually working inby unsupported roof. I find nothing in the plan to support the defense and accordingly reject it.

I further find that the violation was "significant and substantial". National Gypsum, supra. According to the uncontradicted testimony of Inspector Pyles, there had been a history of roof falls at the Pride No. 6 Mine and that the stability of the cited unsupported roof was "unpredictable." Moreover, there had previously been six roof falls in the same general area of the mine. Two miners were working on the roof bolter in the vicinity of the unsupported roof at the time the condition was discovered and would have been the most likely victims of any roof fall. Serious and fatal injuries would be likely if the roof did in fact fall. The violation was accordingly "significant and substantial" and of a high level of gravity.

According to the undisputed testimony of Inspector Pyles, it is the industry practice for the section foreman to run the sites for center lines and to mark the width of places to be cut before the cut is actually made. The cutting machine operator indeed would not have the authority to proceed with his work until such directions were given by the section foreman. It may therefore reasonably be inferred that an agent of the operator, the section foreman, knowingly directed the commission of the violation.

In determining the appropriate civil penalty for the violations within the framework of section 110(i) of the Act, I am also considering that the operator is medium to small in size and that it has a fairly substantial history of violations including previous violations of the standards cited herein.

Citation No. 2074459 is vacated. Citation No. 2074458 is affirmed and a penalty of $300 is assessed. Citation No. 2075863 is affirmed and a penalty of $500 is assessed. The penalties herein shall be paid within 30 days of the date of this decision.

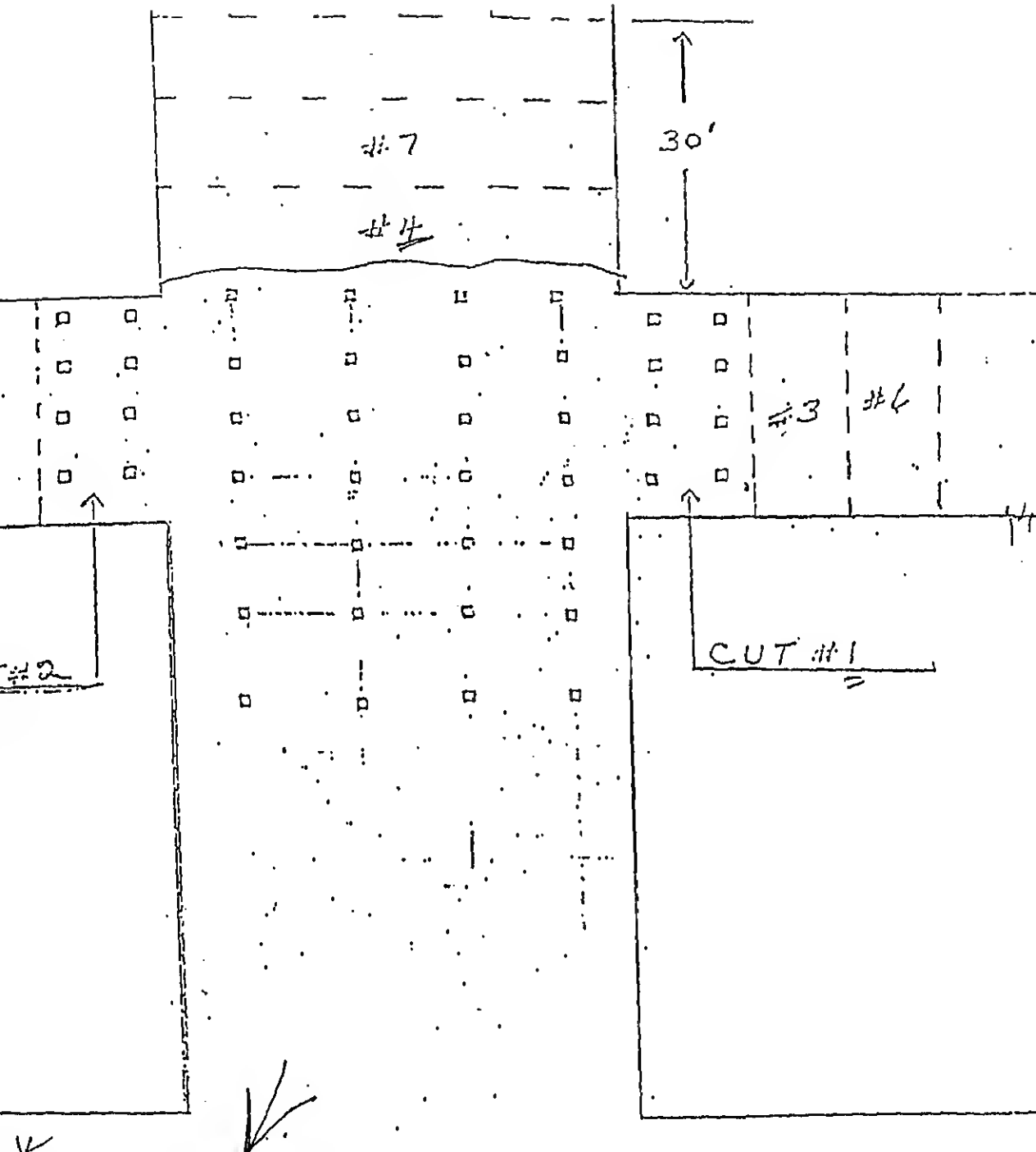
Gary Melick
Assistant Chief Administrative Law Judg

Distribution:

Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William M. Craft, Assistant Director of Safety, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certifie Mail)

/fb



*

Cuts #1 & 2 will be extracted and the roof supported, then on the next mining cycle, cuts #3, 4 & 5 will be taken in a normal manner, etc. The face will be driven no more than 30' from the inby rib of crosscut until crosscut is

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI
v.	:	Docket No. LAKE 83-74-
MEDUSA CEMENT COMPANY, Respondent	:	A.C. No. 20-02514-055(
	:	Medusa Cement Company (Plant)

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settleme in the above-captioned proceeding. The Solicitor propose to settle the eleven violations in this case for the orig assessments total of $326.

Six of the violations were originally assessed for $ apiece. The Solicitor advises that one of these violatio involved no negligence, three involved a low degree of negligence and one involved a moderate degree. The Solic also represents that in two of these violations there was likelihood of an injury and in three the occurrence of an injury was unlikely. He notes that abatement was accom- plished in each instance. However, the Solicitor gives n basis for any of his assertions regarding negligence and gravity. In one instance, Citation No. 2088996, he makes representations at all regarding negligence and gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty asses ment regulations adopted by the Secretary but rather tha a proceeding before the Commission the amount of the pen to be assessed is a de novo determination based upon the statutory criteria specified in section 110(i) of the Ac and the information relevant thereto developed in the co of the adjudicative proceeding. Sellersburg Stone Compa 5 FMSHRC 287 (March 1983). Indeed, if this were not so,

The five remaining violations were assessed for amounts ranging from $30 to $68. The Solicitor advises that two of these violations involved no negligence and three involved a low degree of negligence. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. The Solicitor gives no basis for his assertions regarding negligence or the significant and substantial nature of these violations. The inspector has checked boxes concerning negligence and gravity for all five violations.

I have recently held in many other cases that the term "significant and substantial" is irrelevant in a penalty proceeding before the Commission. Under section 110(i) the relevant criterion is gravity. But as I also have previously stated, I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. In absence of other evidence penalty amounts of $30 or $39 as recommended in some of these cases would appear low. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

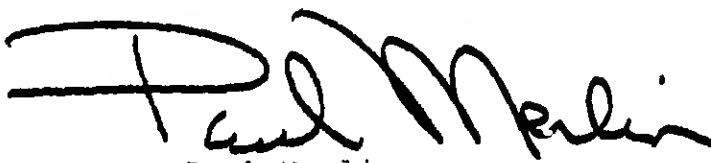
In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-75-M, LAKE 83-77-M and LAKE 83-81-M.

Accordingly, the settlement motion is Denied and this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case sh
addressed to Judge Broderick at the following address

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215



Paul Merlin
Chief Administrative Law Jud

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S.
ment of Labor, 230 South Dearborn Street, Eighth Floo
Chicago, IL 60604 (Certified Mail)

Mr. Thomas Thimm, Plant Manager, Medusa Cement Compar
Bells Bay Road, P. O. Box 367, Charlevoix, MI 49720
(Certified Mail)

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-75-M
Petitioner	:	A.C. No. 20-00038-05501
v.	:	
	:	Medusa Cement Company
MEDUSA CEMENT COMPANY,	:	(Plant)
Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the twenty violations in this case for the original assessments total of $1,341.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that one of these violations involved a moderate degree of negligence and five involved a low degree. The Solicitor also states that in each violation the occurrence of an injury would have been unlikely. He notes that abatement was accomplished in each instance. However, the Solicitor gives no information to support his representations regarding negligence and gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. Of course, the Commission is not bound by 30 C.F.R. § 100.4 which was the basis of six $20 "single penalty assessments."

substantial. He notes that abatement was accomplished in each instance. Here again, the Solicitor gives no information to support his conclusions regarding negligence or gravity. The inspector checked boxes concerning negligence and gravity for all fourteen of these violations. Most of the checked boxes coincide with the Solicitor's conclusions. In one instance, Citation No. 2089069, however, the inspector indicates no negligence while the Solicitor indicates a low level of negligence.

In many other cases I have previously stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already pointed out, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

Accordingly, the proposed settlements must be Denied.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-77-M and LAKE 83-81-M.

In light of the foregoing, this case is assigned to Administrative Law Judge James A. Broderick.

Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

cribution:

ael Alvarez, Esq., Office of the Solicitor, U. S. Depart-
t of Labor, 230 South Dearborn Street, 8th Floor, Chicago,
60604 (Certified Mail)

Thomas Thimm, Plant Manager, Medusa Cement Company,
ls Bay Road, P. O. Box 367, Charlevoix, MI 49720
rtified Mail)

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-76-M
	:	A.C. No. 20-00038-05502
v.	:	
	:	Medusa Cement Company (Plant)
MEDUSA CEMENT COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the two violations in this case for the original assessments total of $105.

Citation No. 2089083 was issued for a violation of 30 C.F.R. § 56.11-1 because a build-up of cement was noted on the stairway and walkway at the bottom of the transfer elevator. The violation was assessed at $85. The Solicitor states that the operator demonstrated a low degree of negligence but he gives no basis for this assertion. The Solicitor further states that the violation was significant and substantial but again he gives no reasons. The inspector checked boxes indicating that negligence was low and that occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty.

Citation No. 2089085 was issued for a violation of 30 C.F.R. § 56.11-12 because the cover plate for the No. 2 fuel oil pump pit was not in place. The violation was assessed at $20. The Solicitor states that the operator demonstrated a low degree of negligence and that there was no likelihood of an injury. However, the Solicitor provides no information to support these representations.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to

5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. Of course, the Commission is not bound by 30 C.F.R. § 100.4 which was the basis of the one $20 "single penalty assessment" in this penalty proceeding.

The Solicitor has told me nothing about size, prior history, or ability to continue in business. Under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria.

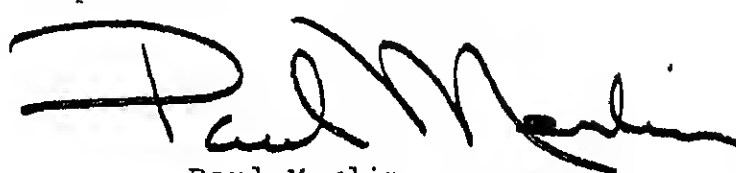
In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding.

Accordingly, the settlement motion is Denied and this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215



Paul Merlin
Chief Administrative Law Judge

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-77-M A.C. No. 20-00038-05503
v.	:	Medusa Cement Company (Plant)
MEDUSA CEMENT COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the eleven violations in this case for the origin assessments total of $691.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that two of these violations involved a moderate degree of negligence and four involved low degree. The Solicitor also states that in each violati the occurrence of an injury would have been unlikely. He notes that abatement was accomplished in each instance.

Three of these $20 violations, which involved the failure to properly locate emergency stop devices at unguar pinch points, were originally determined to be significant and substantial violations. Each citation was modified because, the inspector found, "the endangered party would probably be able to activate the emergency stop cord or would be drawn into it which would activate the emergency stop and accomplish its purpose of minimizing injury. Therefore [the citation] is modified to indicate the occurrence is unlikely." The inspector's statement that an endangered party "probably" could activate the emergency cord or otherwise "be drawn into it" does not by itself constitute a sufficient basis to conclude whether or not the violation was significant and substantial. On the contrary, the statement is particularly vague and uninformative. Most importantly, for present purposes I do not have any basis upon which to determine gravity.

Another of the $20 violations, which involved the failure to guard a drive chain, also was determined originally to be a significant and substantial violation. The citation was modified because, according to the inspector, roping off an area in front of and to the side of the chain drive and attaching a sign to the rope "would alert anyone coming on to the scene to the unusual condition and would make it unlikely that anyone would be injured as a result of the missing guard." The inspector's statement, alone, does not justify a $20 penalty, which in my opinion, most often denotes an absence of gravity.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. The recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can predicate settlement approvals of $20 apiece. Of course, as I previously have held the Commission is not bound by 30 C.F.R. § 100.4 which is the basis of the six $20 "single penalty assessments."

The five remaining violations were assessed for amounts ranging from $85 to $136. The Solicitor advises that one of these violations involved a moderate degree of negligence and four involved a low degree. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. Here again, the Solicitor gives no information for his conclusions regarding negligence and gravity. "Significant and substantial" is not the same as gravity. The inspector did check boxes concerning negligence and gravity for all five of these violations. Most of the checked boxes coincide with the Solicitor's conclusions. In one instance, Citation No. 2089050, however, the inspector indicates a moderate degree of negligence while the Solicitor indicates a low degree.

penalty in light of the six specified criteria. In addition to inadequate data on gravity and negligence, the Solicitor has told me nothing about size, prior history, or ability to continue in business.

Accordingly, the proposed settlements must be Denied.

In another case involving this operator (LAKE 83-80-M) I disapproved a settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-75-M and LAKE 83-81-M.

In light of the foregoing, this case is assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Mr. Thomas Thimm, Plant Manager, Medusa Cement Company, Bells Bay Road, P. O. Box 367, Charlevoix, MI 49720 (Certified Mail)

/ln

October 14, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-81-M
	:	A.C. No. 20-02514-05502
v.	:	
	:	Medusa Cement Company (Plant)
MEDUSA CEMENT COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the three violations in this case for the original assessments total of $98.

Citation No. 2088997 was issued for a violation of 30 C.F.R. § 56.14-1 because guarding was not provided for the counterweight wheel for a shaker screen. The violation was assessed at $20. The Solicitor states that the operator demonstrated a moderate degree of negligence and that an injury was unlikely to occur. The Solicitor, however, provides no information to support these assertions.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. The mere recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can approve $20 penalty assessments.

Citation Nos. 2089063 and 2089064 were issued for failure to properly maintain a fire extinguisher and failure to clear a walkway of material causing a slip and fall

the inspector checked boxes indicating that negligence was low and that occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restrict duty. I have previously stated that I cannot base a settleme approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already noted, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria, including gravity. In absence of other evidence, $39 would appear a low penalty amount. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-74-M, LAKE 83-75-M and LAKE 83-77-M.

Accordingly, the settlement motion is Denied and this case is hereby assigned to Administrative Law Judge James A. Broderick.

All future communications regarding this case should be addressed to Judge Broderick at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge

/ln

OCT 14 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 83-52 A.C. No. 36-05018-03507
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Thomas A. Brown, Jr., Esq., and Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves a single citation issued September 9, 1982 alleging a violation of 30 C.F.R. § 75.200 because Respondent failed to comply with its approved roof control plan. Respondent does not deny that the violation occurred, but denies that it was significant and substantial, and contests the amount of the penalty. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on June 22, 1983. Steve Yurkovich testified on behalf of Petitioner; Don Laurie and Rudy Juracko testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Greene County, Pennsylvania, known as the Cumberland Mine.

2. The subject mine produces in excess of 1 million tons of coal annually. Respondent produces in excess of 15 million tons of coal annually. Respondent is a large operator.

4. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

5. The approved roof control plan in effect at the subject mine at all times pertinent to this proceeding required that in a track haulage intersection spans a minimum of one crib or two post be installed as supplementary roof supports in one or more of the inactive approaches (Government Exh. 2).

6. On September 9, 1982, supplementary roof supports were n present in either of the approaches to the track haulage road at the intersection of the No. 3 entry and the 21st crosscut in the 63 Face South section of the subject mine. Citation No. 2011731 was issued charging a violation of 30 C.F.R. § 75.200.

7. The roof in the cross cut was "potted out" in an area of about 80 or 90 square feet. The roof was split inby the intersec tion and starting to break.

8. Ten roof bolts had been installed in the potted out area which apparently occurred during the mining cycle when the miner operator cut higher than normal. The ten bolts were three or fou more than called for in the roof control plan. The mining of thi area took place about 14 weeks prior to the issuance of the citation.

9. Header blocks were added to the bolts in the potted out area to catch loose material around the bolt.

10. The violation was abated September 9, 1982, by the installation of two posts in the right side of the intersection. They were later replaced by cribs in October or November of 1982.

ISSUES

1. Was the violation of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subjec mine, and I have jurisdiction over the parties and subject matte of this proceeding.

nificantly and substantially contribute to the cause and effect a mine safety hazard.

CUSSION

The roof control plan requires additional supports at track lage intersections to help prevent roof falls along the lage roads. Not all roof control plans have such a requirement, the MSHA Inspector admitted that such a requirement is not essary for haulage intersections unless the roof conditions are However, the intersection in question had a large potted out a and was beginning to break. The inspector described the roof the intersection as "bad." In such a place, he believed that ltional supports were necessary to prevent a roof fall. I con- de that a roof fall was reasonably likely to occur as a result the violation and, if it occurred, it would likely cause serious aries to miners. This judgment must be made considering the ditions present at the time the citation was issued. The fact t the roof has not fallen and the cribs are apparently not ring weight as of the hearing date is not determinative of the stion.

4. The violation was serious. Roof falls are the most common se of fatalities in the nation's mines.

5. The violation was obvious. Respondent should have been re of it. It resulted from negligence.

6. Based on the criteria in section 110(i) of the Act, I clude that an appropriate penalty for this violation is $250.

ORDER

Based on the above findings of fact and conclusions of law, IT RDERED

1. Citation No. 2011731, including its designation as signifi- and substantial, is AFFIRMED.

2. Respondent shall, within 30 days of the date of this order, the sum of $250 for the violation found herein to have occurred.

James A. Broderick
James A. Broderick
Administrative Law Judge

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 83-111-M
	:	A.C. No. 35-00540-05501
v.	:	
	:	Ross Island Plant
ROSS ISLAND SAND & GRAVEL COMPANY, Respondent	:	

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

On September 28, 1983, I ordered the Solicitor to submit additional information to support the proposed settlements of $20 apiece for the two violations involved i this matter. The Solicitor has now responded.

With respect to Citation No. 2225917 the Solicitor advises as follows:

> In regard to this citation, detailing the fact that a work deck area behind a screen where the scalper machine was located, was being littered with wood and other debris, a violation of 30 CFR 56.11.1, if the inspector were to testify he would state in regard to negligence: that the negligence involved was ordinary negligence. The wood scattered around the workplace was obvious and was the result of the company's failure to correct said condition.
>
> In regard to the gravity of the situation, the inspector would testify that there were approximately two or three persons working in the area and it was probable that they would trip or fall. The type of injury that might occur is unpredictable as it would depend entirely on the nature of the fall, but was unlikely to cause lost work days or restricted duty.

With respect to Citation No. 2225918 the Solicitor advises as follows:

> In regard to Citation 2225918 detailing the fact that an acetylene bottle, located in the welding bay, was not secured, a violation of 30 CFR 56.16-5, if the inspector were to testify, he would state in regard to negligence: that the negligence involved was ordinary negligence, in that the operator failed to exercise reasonable care to prevent and correct the condition. The bottle was in plain view and obviously unsecured.
>
> In regard to the gravity of the situation, the inspector would testify that there were two to three men working in the area all the time doing welding or working at the front end of a loader. The probability of an accident occurring was 'probable' because although there was no flammable material around, there remains the possibility of pressure accumulating and the bottle acting like a trajectory. The gravity of an injury if it were to occur would be unpredictable depending upon the length of time the bottle was unsecured and the direction it took. It would be expected that a minimal number of days would be lost or work restricted.

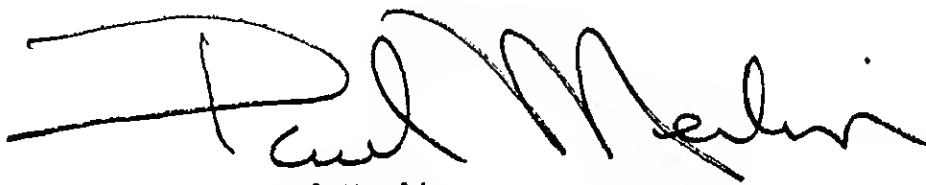
In light of the foregoing, I am unable to approve $20 settlements for either of these violations. Although the operator is small and without a prior history, gravity and negligence in both instances appear at first blush to be much greater than would be consistent with $20 penalties. At the very least, the inspector's statements raise questions which should be resolved at hearing.

Accordingly, the motion for settlement is Denied. This case is hereby assigned to Administrative Law Judge Virgil E Vail.

All future communications regarding this case should be addressed to Judge Vail at the following address:

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
333 W. Colfax Avenue, Suite 400
Denver, CO 80204

Telephone No. 303-837-3577



Paul Merlin
Chief Administrative Law Judge

Distribution:

Rochelle Kleinberg, Esq., Office of the Solicitor, U. S. Department of Labor, 8003 Federal Office Building, Seattle, WA 98174 (Certified Mail)

Mr. R. G. Tuttle, Corporate Director, Ross Island Sand & Gravel Company, 4315 South East McLoughlin Blvd., P. O. Box 02219, Portland, OR 97202 (Certified Mail)

NCHFIELD COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. VA 82-51-R
v.	:	Order and Citation No. 2038802; 6/18/82
RETARY OF LABOR, INE SAFETY AND HEALTH DMINISTRATION (MSHA), Respondent	:	Hurricane Creek Mine
RETARY OF LABOR, INE SAFETY AND HEALTH DMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 83-24
	:	A. C. No. 44-01773-03509
v.	:	Hurricane Creek Mine
NCHFIELD COAL COMPANY, Respondent	:	

DECISION

earances: Fletcher A. Cooke, Esq., Clinchfield Coal Company, Lebanon, Virginia, for Contestant/Respondent; Paul Thompson, General Counsel, Pittston Coal Group, Lebanon, Virginia, for Contestant/Respondent; David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

ore: Judge Steffey

A hearing was held on April 27 and 28, 1983, in Abingdon, ginia, in the above-entitled proceeding pursuant to sections (d) and 107(e), 30 U.S.C. §§ 815(d) and 817(e), of the Fed- l Mine Safety and Health Act of 1977. The parties indicated the conclusion of the hearing that they wished to file post- ring briefs. Counsel for both parties filed simultaneous tial posthearing briefs on August 17, 1983, and counsel for nchfield Coal Company filed a reply brief on September 9, 3.

ues

The subject of the hearing was the issuance by MSHA on e 18, 1982, of Order and Citation No. 2038802, pursuant to

April 6, 1983, in Docket No. VA 83-24, a petition for assessment of civil penalty seeking to have a civil penalty assessed for the alleged violation of section 75.200 alleged in Order and Citation No. 2038802.

The three basic issues raised by the parties are: (1) wheth er a violation of section 75.200 occurred; (2) whether an imminen danger existed on June 18, 1982, when Order No. 2038802 was issue and (3) what civil penalty should be assessed under section 110(i of the Act if a violation of section 75.200 is found to have occurred.

Summary of the Evidence

Counsel for the Secretary of Labor and counsel for Clinchfield Coal Company entered into the following stipulations (Tr. 7-8): (1) Clinchfield is the owner and operator of the Hurricane Creek Mine involved in this proceeding. (2) Clinchfield and the Hurricane Creek Mine are subject to the Act. (3) The administrative law judge has jurisdiction to hear and decide the case. (4) The inspector who issued Order No. 2038802 on June 18, 1982, under sections 107(a) and 104(a) of the Act is a duly authorized representative of the Secretary of Labor. (5) A true and correct copy of Order No. 2038802 was properly served upon Clinchfield. (6) All witnesses are accepted generally as experts in coal mine health and safety. (7) Imposition of civil penalties will not affect the operator's ability to continue in business. (8) Clinchfield is a medium-sized coal company which produces about 3,000,000 tons of coal annually. (9) The Hurricane Creek Mine is a medium-sized mine. (10) The Mine Safety and Health Administration and the Virginia Division of Mines conducted a joint investigation on June 4, 1982, of an accident which occurred at the Hurricane Creek Mine on June 2, 1982, and also conducted on June 18, 1982, a reinvestigation of the accident, but the MSHA and Virginia personnel who participated in the reinvestigation on June 18, 1982, were not involved in the issuance of Order No. 2038802 (Tr. 328).

The issues in this proceeding must be resolved in light of the witnesses' testimony which is summarized in the following paragraphs:

1. Nickie Brewer, a coal-mine inspector from MSHA's Norton Virginia, Office conducted a spot inspection at Clinchfield's Hurricane Creek Mine on June 18, 1982. He was accompanied into the mine by Supervisory Inspector E. C. Rines, and by Denver Meade, a member of the United Mine Workers of America and chairman of the safety committee at the Hurricane Creek Mine (Tr. 10-12; 78; 130).

danger. Therefore, at 12:00 Noon he issued Order No. 2038802 dated June 18, 1982, under section 107(a) of the Act. Order No. 2038802 also cited a violation of 30 C.F.R. § 75.200 under section 104(a) of the Act (Tr. 12; 20; 73). The condition or practice given in the order reads as follows (Exh. 1, p. 1):

> An unsupported, overhanging, arching rock brow that showed separation (cracked and broken) was present along the left rib of the No. 5 entry, right crosscut of the 2 Left (005) Working Section where a roof fall had occurred and a continuous-mining machine had been recovered from under fallen roof material. This brow began approximately 57 feet inby the centerline off the No. 5 entry and extended inby approximately 20 feet. The brow arched toward the center of the entry approximately 9 feet and was 2 feet thick.
>
> Another unsupported rock brow was present along the right rib of the same entry crosscut, beginning approximately 54 feet inby the same centerline and extending inby approximately 18 feet. The brow overhung from 22 inches to approximately 9 feet out over the entry. Unsupported, fractured roof was also present immediately inby the fall area in the No. 6 entry measuring 9 feet by 9 feet extending inby to the face and right rib of the No. 6 entry.
>
> At the time of this inspection there was no activity in this vicinity and the area was dangered off. However, a continuous-mining machine had been recovered in this area prior to this inspection.

3. Order No. 2038802 was terminated on December 6, 1982, and the reason given for terminating the order was that (Exh. 1, p. 2):

> The safe procedure for recovering mine machinery from area where roof falls have occurred has been discussed with the workmen on all shifts. Also the area where the roof fall had occurred had been dangered and barricaded off. The company also has no intention of mining in the area of the roof fall.

4. Brewer testified that on June 18 he found no danger sign of any kind to warn persons of the hazards of going into the crosscut in which the unsupported brows existed (Tr. 46; 318-319). In his order, however, Brewer had stated that "* * * there was no activity in this vicinity and the area was dangered

danger signs, Brewer should modify his order to remove the ambiguous refcrence to the area's having been dangered off (Tr. 56). Therefore, on January 18, 1983, Brewer issued a modification of the order reading as follows:

> Order No. 2038802 issued June 18, 1982, is hereby modified to include the following statement:
>
> The approaches to this area of violation prior to the issuance of the order of withdrawal were not dangered off.

5. In support of his finding of the existence of an imminen danger, Brewer introduced as Exhibit 2 a diagram of the way the overhanging brows appeared to him when he examined them by going into the crosscut from the No. 5 entry. Brewer wrote the letter "A" on Exhibit 2 to show the location of the right rib of No. 6 entry inby the brows (Tr. 22). The letter "B" on Exhibit 2 shows the location of the left brow which was 20 feet long, was arched out over the center of the crosscut for a distance of 9 feet, and was about 2 feet thick. Brewer was especially concerned about a crack at the place where the left brow began (Tr. 13). He interpreted the existence of the crack as an indication that the brow was just hanging there "waiting to fall" (Tr. 22; 32). Brewer wrote the letter "C" on Exhibit 2 to show the location of the right brow which was 18 feet long, arched out over the crosscut a distance of from 22 inches to 9 feet, and was 1-1/2 to 2 feet thick. Brewer placed the letter "D" on Exhibit 2 to mark the 9-foot square area in the roof of the No. 6 entry where the roof was unsupported, cracked, and broken (Tr. 24).

6. Brewer stated that the brows described in summary paragraph No. 5 were the remaining edges of a roof fall which had occurred in the crosscut on June 2, killing two miners and covering up Clinchfield's continuous-mining machine (Tr. 33). Brewer said that a motor and a control bank had to be replaced on the continuous-mining machine before it could be extricated from the roof fall and it was his belief that the miners were exposed to unsupported roof while they were in the process of replacing the parts. Brewer introduced as Exhibit 4 a diagram showing that the overhanging brows would have been over the head of anyone replacing parts on the continuous-mining machine or working the control to extricate the continuous-mining machine from the crosscut (Tr. 34-39).

7. Although no coal was being produced in 2 Left Section at the time Brewer wrote the order citing an imminent danger, he said that the continuous-mining machine recovered from the roof-fall area was about 120 feet away from the fall area and that if

because preshift examinations of the area would have had to hav
been made in order for repairmen to work on the disabled contin
uous-mining machine (Tr. 18-19). Since he had found no danger
sign or breaker posts when approaching the crosscut from the No
5 entry, he said that it was quite likely to assume that the pr
shift examiner would go into the crosscut to the No. 6 entry to
take an air reading and be killed by one of the unsupported
brows (Tr. 19-20). Brewer also believed that Clinchfield's fai
ure to support the brows was associated with a high degree of
negligence because supervisory personnel were in the crosscut a
the time the continuous-mining machine was recovered and yet th
had taken no action to correct the hazardous conditions which
existed when he inspected the crosscut on June 18 (Tr. 41).

8. Brewer's supervisor, E. C. Rines, supported Brewer's exhibits and his belief that an imminent danger existed. Rines emphasized the height of the brows where they terminated agains the roof cavity, their 9-foot extension from the ribs toward th center of the crosscut (Tr. 91), and the fact that there were n bolts in the brows and that the only bolts they saw were in the center of the crosscut (Tr. 93), except for a single bolt near the rib in the right brow close to the point where the crosscut intersected with the No. 6 entry (Tr. 92; Exh. 3, p. 1). Rines believed that single bolt had failed to pull out when the roof fall occurred. Rines said that even if Clinchfield had erected a danger sign at the intersection of the No. 5 entry and the crosscut cited in the order, the existence of a danger sign would not be a reason to prevent an inspector from issuing an imminent-danger order (Tr. 310-311).

9. Larry Coeburn was the MSHA inspector normally assigned to perform inspections at the Hurricane Creek Mine (Tr. 126). He was not with Brewer and Rines when the imminent-danger order was issued, but he accompanied Clinchfield's personnel when the went to examine the crosscut on June 22 and he concurred with Brewer's and Rines' belief that the unsupported brows in the crosscut constituted a very hazardous condition. He believed that if the brows had fallen, they would necessarily have falle across the middle of the crosscut. He said that when he went t the roof-fall area on June 22, there was still no physical obstruction to prevent a miner from entering the hazardous crosscut from the No. 5 entry. Therefore, he participated in cuttin timbers and boards so that they could erect actual barricades a each end of the roof-fall area to preclude persons from enterin the area unless they removed the barriers (Tr. 125). At the time they erected the barricades, actual production of coal was being conducted in the 2 Left Section just two crosscuts inby

Brewer on his inspection of the 2 Left Section, located
likelihood of the brows' falling was "[j]ust about as great
chance as it could get. I made the statement up there it w
like working close to a cocked gun, working up there" (Tr.
131). Meade participated in installing roof bolts and in e
ing crossbars outby the area of the roof fall. He said tha
saw no supports whatsoever under the brows cited in the imm
danger order and that he was just about as confident as one
get in stating that there were no roof bolts in the brows (
131). Meade also testified that a company official, Gail K
went out from under both permanent and temporary supports t
attach ropes to rocks so that the rocks could be pulled off
the continuous-mining machine which had been covered up in
roof fall (Tr. 132). Meade placed an "X" on page 1 of Exhi
to show the location of one of the rocks which were pulled
before the continuous-mining machine could be removed (Tr.

11. A preshift examiner, Robert Vickers, testified th
preshifted the 2 Left Section between 9 p.m. and midnight o
June 17, 1982, and he introduced as Exhibit A a preshift ex
ner's report showing that he wrote the words "Danger off at
on the line for noting hazards in the No. 6 entry. Vickers
that the notation was made because he saw a Pepsi or Coke c
with illuminated tape on it hanging from a roof bolt about
level in the No. 5 entry near the crosscut leading to the
fall area. Vickers claimed that a reflectorized can was us
in the Hurricane Creek Mine as a danger sign and that miner
know to examine the area inby such cans for hazardous condi
before entering such areas. Vickers said his notation was
tended to mean that the entire fall area and both the appro
from entries Nos. 5 and 6 had been "dangered off" (Tr. 149-
Vickers stated that he did not go inby the reflectorized ca
that he inspected the No. 6 entry by going through the cro
outby the roof-fall area to examine the No. 6 entry. Vicke
could not recall when the can first appeared in the No. 5 e
but he made another preshift examination between 9 and mid
on June 18 and the can was still hanging in the No. 5 entr
where he had observed it on June 17 (Tr. 155). Vickers al
believed that there was a reflectorized can in the No. 6 e
(Tr. 156). Vickers went so far as to assure the Secretary
counsel that he was as certain that there was a can in bot
No. 5 and No. 6 entries as he was that he was sitting in t
courtroom (Tr. 157).

12. Logan Busch, a Clinchfield miner with 13 years o
experience, including 8 years of operating a continuous-mi
machine, participated in the removal of the continuous min
which had been covered up by the roof fall in the crosscut
tween Nos. 5 and 6 entries (Tr. 179-180). He and another

drill, they were using weighs about 200 pounds and is very difficult to use in the cramped conditions they encountered on top of the miner and on the side of the miner (Tr. 191-195; 201-203). Busch said that they installed roof bolts every place they could reach with the stoper. Some of the area on the right side of the miner was too high to reach with the steel they were using (Tr. 185) and they could not bolt the roof over and immediately outby the ripper head because the ripper was cutting coal at the time the roof fell and the rock at the top of the head and immediately behind the head was still lying on top of the miner and there was no room at all to use the stoper in that area (Tr. 183)

13. Busch, who has assisted in recovering about seven or eight continuous miners from roof falls (Tr. 181), and some other Clinchfield employees went to the 2 Left Section on Sunday, June 13, 1982, to remove the continuous-mining machine after the roof had been bolted and most of the rocks had been removed from the sides of the continuous miner. Busch and his supervisor, Don Cross, removed some remaining rock from behind the boom of the miner while a repairman, Roy Sauls, installed a pump and a valve block on the right side of the miner (Tr. 180). Busch then positioned himself at the continuous miner's controls, but the miner was not yet free enough to be trammed from the area until a rope was attached to the miner and hooked to a scoop (Tr. 185). By using the ripper head to dislodge rocks near the front of the miner and by relying upon the scoop's assistance, Busch was able to back the miner out of the crosscut (Tr. 186). Busch stated that there were bolts over the deck of the miner which made him believe it was safe for him to operate the controls (Tr. 182). He was, nevertheless, aware of the crack in the left brow, but he concluded that the left brow was caught against firm rock in the center of the bolted roof-fall cavity. He further believed that if the left brow had fallen, it would have fallen on the continuous miner at a point inby the operator's controls where he was situated (Tr. 203-204).

14. After Busch and the other members of the recovery team had added oil to the miner's hydraulic system, they succeeded in tramming it outby the crosscut for about a break and a half and they left it there for evaluation as to the need for further repairs (Tr. 190). Busch says that the reflectorized can, describe in summary paragraph No. 11 above, was "still" in the No. 5 entry on June 13, but he thinks or is "pretty sure" that they also erected a single timber in the intersection of the No. 5 entry with the crosscut and that they wrote the word "Danger" on that single timber (Tr. 190). After Busch had trammed the miner out of the crosscut, no supports at all were left in the roof-fall

fall where the crosscut intersected the No. 6 entry (Tr. 189).

15. Roy Sauls, a repairman with 13 years of experience, including 12-1/2 years of experience in the Hurricane Creek Mine has assisted in recovery of continuous-mining machines from seven or eight roof falls (Tr. 205; 212). He replaced the "C" pump and valve block on the right side of the miner on Sunday, June 13, just before the miner was trammed from the crosscut. He worked at the edge of the right brow in doing so and the brow had neither roof bolts nor temporary supports under it at the time he did the work (Tr. 207-208). He examined the brow and felt that the fall area had been made as safe as a fall area can be made. While he considered it safe for him to do the repair work, he also expressed the opinion that "[t]here's a possibility there could have been another fall in there anywhere" (Tr. 209). Sauls stayed around on June 13 until his supervisors and he had examined the continuous-mining machine and it was the consensus that the miner would have to be disassembled and taken to the central shop to be rebuilt because the damage done to it by the roof fall was too extensive to be repaired underground (Tr. 211).

16. Don Cross has worked for Clinchfield for 18 years and he was the supervisor in charge of recovery of the continuous-mining machine on June 13, 1982 (Tr. 213). His account of the recovery of the continuous miner does not differ from Busch's explanation which has been summarized in paragraph Nos. 12, 13, and 14 above. There was likewise little difference in the testimony of Busch and Cross as to the setting of a timber outby the crosscut with the word "Danger" written on it after removal of the continuous miner from the crosscut. Just as Busch had stated that he "was not for sure" and "believed" that they had erected such a timber (Tr. 190), so did Cross qualify the setting of the timber "to the best of [his] knowledge" (Tr. 215). Cross, like Busch, also stated that the reflectorized warning can was "still hanging in the No. 5 entry at the approach into the crosscut (Tr. 215). Cross' credibility also suffers somewhat from his inconsistent statement on cross-examination that he had only worked 1 day in the fall area (Tr. 216) as compared with his statement during direct examination that "* * * we had worked on the area the shift previous" (Tr. 214).

17. Monroe West has been Clinchfield's safety director since September 1, 1977. Prior to that, he served for 18 years in various positions with the Bureau of Mines and MSHA, including several years as subdistrict manager of MSHA's Norton, Virginia, Office (Tr. 217). He was in the No. 5 entry and crosscut on June 18 when the imminent-danger order was issued, but he

of the roof-control plan provides as follows (Tr. 223):

> (a) Upon completion of the loading cycle, a reflectorized warning device, such as a "stop" sign, shall be conspicuously placed to warn persons approaching any area that is not permanently supported. It is to be emphasized that the warning device has been placed to cause the person to stop, examine, and evaluate the roof and rib conditions prior to entering the area--even after temporary supports have been installed.

West said that a reflectorized can was used at the Hurricane Creek and other mines to warn miners of hazardous conditions and that miners will not enter the area beyond such a warning device even if no physical barrier is erected to prevent them from going into the area beyond such a can (Tr. 223-225).

18. West was asked to examine the preshift report made by an examiner for the oncoming 8-a.m.-to-4-p.m. shift on June 18 and that report has no notation at all to show that the reflectorized can did or did not exist in the No. 5 entry of the 2 Left Section (Tr. 230). West stated that it is not necessary to preshift a section which is idle if there is no activity in the section (Tr. 228), but he said that preshifts were required when miners were working in the 2 Left Section to determine the exact locations of roof bolts or to perform repairs on the continuous-mining machine (Tr. 228).

19. Ronald Hamrick, an employee of the Virginia Division of Mines with 30 years of coal-mining experience, testified that he was in the 2 Left Section on June 2, 4, and 18, 1982, as a participant in the original investigation and reinvestigation of the roof fall which occurred on June 2 (Tr. 249-250). On June 18 he was in the No. 6 and No. 5 entries and he recalls seeing a reflectorized can hanging in the No. 5 entry. He looked beyond the can into the crosscut and saw roof bolts and believed that they had forgotten to remove the can because it appeared that the crosscut had already been permanently supported. He did not go more than 10 or 15 feet into the crosscut because his supervisor called him about the time he saw the can and they went inby the crosscut and examined the face areas and torqued roof bolts (Tr. 251-252). Hamrick did not see the reflectorized can on June 4 and does not think one existed at that time (Tr. 258). Hamrick said that he probably made some notes about the investigation but that he did not have the notes with him and that he doubts if he would have made a notation about observing the reflectorized can because that is a common occurrence (Tr. 258).

that the first investigation occurred on Friday, June 4. The mi was idle for the miners' vacation from June 2 to June 10, 1982 (Tr. 227; 238). They began the work preparatory to recovering the continuous-mining machine on Monday, June 7, by having miner bolt the roof outby the fall area. That work continued, including the installation of crossbars from the No. 5 entry on into the crosscut up to the boom of the continuous miner, and the stopering or bolting of the roof-fall cavity above the continuou miner. The miner was recovered on Sunday, June 13, and was take to the end of the track "about" Wednesday, June 16, so that it could be disassembled and transported to the central shop for rebuilding. Normal or routine production in the 2 Left Section did not resume until July 12, 1982, according to Hess (Tr. 262-267).

21. Hess testified that they mined the crosscut inby the one in which the roof fall occurred and that they went inby the roof fall by proceeding inby in the No. 6 entry. They never did connect up the No. 6 entry with the area where the roof fall occurred and where Inspector Brewer had found the 9-foot square area of unsupported and cracked roof (Tr. 265; 268). The decision not to proceed with normal mining from the face side of the No. 6 entry was made, however, after Brewer issued the imminent-danger order on June 18, 1982 (Tr. 266). Hess stated that the Hurricane Creek Mine had only three continuous-mining machines at the time the roof fall occurred. After the continuous miner damaged in the roof fall had been removed for repair to the central shop, another one had to be brought into the mine in order for them to continue mining activities in the 2 Left Section. On June 18, 1982, when the imminent-danger order was issued, the closest active mining then in progress was about 2,000 feet away in the 2 Right Section (Tr. 264-265).

22. Paul Guill is Clinchfield's chief engineer (Tr. 158). He presented as Exhibit B a diagram of the roof-fall area showir the continuous-mining machine's location in the crosscut and the number of roof bolts he and his surveyors found in the crosscut (Tr. 160). Guill testified that he and his assistants set up transits at points marked with the numbers "1691" and "1692" on Exhibit B. From those points they "shot" the roof bolts and plotted each of the roof-bolt locations on Exhibit B (Tr. 161-162). Guill shows dotted lines and solid lines to mark the beginning and ending edges of the brows cited in Inspector Brewer' imminent-danger order. Guill explained that his Exhibit B

examination. Of Inspector Brewer's Exhibit 3, page 1, appears to show more roof bolts in the center of the crosscut than Guill depicts in his Exhibit B, that is not really the case because Guill's "modes of representation are different" from Brewer's as a result of the three-dimensional aspects of Guill's roof-bolt exhibit (Tr. 169). On Exhibit 3, page 1, Inspector Brewer shows 13 roof bolts in the immediate roof-fall area if one counts the single roof bolt near the rib where the word "roof bolt" appears. Examination of Guill's Exhibit B shows 20 roof bolts in the roof-fall area, but page 2 of Exhibit 3 shows roof bolts only inby the point where the brows begin and that commencement point is at the junction of the boom with the frame of the continuous-mining machine (Tr. 283; 295; Exh. 3, p. 2). Since Guill's Exhibit B shows at least 7 bolts outby the place where Brewer's Exhibit 3 begins to show the locations of roof bolts in the fall area, Guill's and Brewer's exhibits both reflect the existence of 13 roof bolts in the fall area. The letter "D" was placed on Guill's Exhibit B to denote the fact that Guill agreed with MSHA that no roof bolts had been installed in the mine roof above the ripper head and for several feet outby the ripper head (Tr. 176).

23. In rebuttal of Clinchfield's case, the Secretary's counsel recalled all of his witnesses. Rines, Brewer, and Meade each testified unequivocally that they were in both the No. 5 and No. 6 entries on June 18 from five to seven different times at the place where Clinchfield's witnesses claimed they saw the reflectorized can. They stated that the centerline from which they made their measurements as to the extent of the brows and the location of roof bolts was established very close to the place where the reflectorized can had allegedly been hung and that they did not see such a can on any of their numerous trips in and out of the entries (Tr. 280; 318; 322). They all stated that they are familiar with the use of reflectorized cans as danger signs and that they would have seen it if it had existed in either the No. 5 or No. 6 entry (Tr. 280; 318; 322). Coeburn was not in the crosscut on June 18, but was there on June 22 when Guill and the surveyors took sightings to spot the roof bolts in the crosscut and he stated that no reflectorized can was hanging in the No. 5 entry on that day (Tr. 325).

24. Rines also testified on rebuttal that the timber with the word "Danger" written on it, described by Clinchfield's witnesses Busch and Cross did not exist on June 18 (Tr. 281). Moreover, Rines stated that he was in the crosscut before the miners' bodies were recovered from the roof fall and that he knows that he could have taken a stoper and could have bolted the left and right brows either by resting the stoper on the

porary supports which he himself had helped to install (Tr. 288). Rines admitted during cross-examination, however, tha the roof under the roof fall just immediately outby the head the ripper did not have sufficient clearance on top of the c tinuous-mining machine for Busch or anyone else to install r bolts (Tr. 305).

25. Rines also insisted during his rebuttal testimony the miners exposed themselves to the unsupported left and ri brows during the time they were recovering the continuous mi from the roof-fall area (Tr. 306), although he had stated pr iously during direct examination that he could not say that one was exposed to the unsupported brows during removal of r because he did not see Clinchfield's employees remove the ro (Tr. 90). Rines admitted that he was not a geologist (Tr. 2 but he stated that the Jawbone coal seam being mined in the Hurricane Creek Mine contains "slips" which result in roof f like the one which happened on June 2 and that it is easy to "misjudge the way the planes lie in a slippery roof" (Tr. 28

Consideration of Parties' Arguments

Docket No. VA 82-51-R

The Issue of Whether a Violation of Section 75.200 Occurred

The Portion of Section 75.200 Violated

Pages 4 through 14 of Clinchfield's initial brief are d voted to arguing that no violation of section 75.200 was pro by MSHA. Clinchfield's brief (p. 5) begins its argument by claiming that the inspector failed to specify what portion o section 75.200 had been violated. At transcript page 20 his counsel asked him "[w]hy do you say that there was a violati of 75.200". His reply was that section 75.200 "requires tha the roof and that the ribs be adequately supported. And the ribs were not adequately supported, or brows."

At transcript page 73, Clinchfield's counsel asked the inspector:

> Q Mr. Brewer, in the order you cited, 30 CFR Section 75.200, which refers to the roof-control plan, just for purposes of clarity, what was the specific violation of roof-control plan?

> * * * The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

Based on the testimony quoted above, I find that the inspector clearly explained the portion of section 75.200 which he believed had been violated.

Exposure of Miners to Hazardous Brows on June 13, 1982

Clinchfield's brief (p. 6) alleges that Brewer thought that the miners who recovered the continuous-mining machine from the roof-fall area were exposed to unsupported roof, but Clinchfield claims that none of the inspectors were present when the continuous miner was recovered and do not know whether any miners were exposed to unsupported roof or brows. Clinchfield also cites the testimony of Busch and Sauls, who assisted in recovery of the continuous miner, in support of its claim that no one was exposed to unsupported roof or ribs when the miner was recovered.

As summary paragraph No. 6, supra, shows, Brewer introduced Exhibit 4 for the sole purpose of showing that Sauls would have been exposed to the unsupported right brow when he replaced a pump and a valve block on the continuous miner before it was recovered from the fall area. Sauls' own testimony supports Brewer's belief. During his direct testimony, Sauls first said he wasn't exposed to the unsupported brows and then reversed himself and stated that "I won't say I wasn't, but the mine top was bolted over top of where we was working" (Tr. 207). Sauls also agreed that there were no bolts in the brows and that they did not have any temporary supports under them (Tr. 208). Also as I have noted in summary paragraph No. 15, supra, Sauls stated that there was a possibility that a fall could have occurred at any time. Additionally, as indicated in summary paragraph No. 13, supra, Busch was concerned sufficiently about the crack in the left brow, that he gave consideration to the question of whether it would fall while he was tramming the continuous miner from the fall area.

If one examines the fall area as depicted in Exhibits B and C, page 2, showing the location of the continuous miner in the crosscut, and if one takes into consideration that the continuous

the brows were unsupported by roof bolts. Moreover, as noted in summary paragraph No. 10, supra, Meade was present when rocks were being removed from the top of the continuous miner and Meade stated unequivocally that he had seen one of Clinchfield's company officials go completely out from under supported roof in order to attach ropes to rocks being pulled from the fall area.

It should be noted that Brewer alleged a violation of section 75.200 under section 104(a) of the Act which provides that an inspector may issue a citation for a violation of the Act or a mandatory safety standard if he is engaged in an inspection or an investigation and that he may issue the citation if he "believes" that a violation occurred. I find that the preponderance of the evidence in this proceeding shows that the inspector had ample grounds for believing that the miners were exposed to the hazards of the unsupported brows when they were engaged in removing the continuous miner from the roof-fall area.

Hazards Existing on June 13 versus Hazards Existing on June 18

Clinchfield's brief (pp. 6-7) argues that the crosscut was much more safely supported on June 13 when the continuous miner was recovered than it was on June 18 when the inspector wrote his order. The testimony of Clinchfield's witnesses does not support those claims. Busch stated that he had installed roof bolts where possible and the exhibits show that he had installed 13 roof bolts along the middle of the crosscut's roof (Exh. 3, p. 1; Summary paragraph No. 22). Sauls testified that there were no bolts in the brows or temporary supports under the brows before the continuous miner was removed (Tr. 208). Busch stated that he could not get any bolts in the roof on the right side of the crosscut because the roof was too high to reach with the stoper and that he had not placed any bolts near the ripper head or for several feet outby the ripper head because there was not enough clearance between the roof and the top of the continuous miner (Tr. 192-194). Busch does not even claim to have put more than one bolt in either brow (Tr. 193). Finally, Busch said that he kicked the last rocks off the continuous miner by starting the ripper head (Tr. 186). Therefore, Busch was just as vulnerable to a probable fall of the brows at the time the continuous miner was being removed as the other operator was when he was killed by the previous roof fall which occurred in that identical place on June 2. The preponderance of the evidence shows that there were two unsupported brows at the time the

area on June 18 and issued the imminent-danger order. No significance at all can be placed on Clinchfield's emphasis on the collars or crossbars which had been set in the No. 5 entry outby the roof-fall area because those collars were set before the miner was removed and they continued to exist after the miner was removed (Tr. 186; 195).

The Alleged Timber Inscribed With Word "Danger"

Clinchfield's brief (p. 7) concedes that the roof-fall area was hazardous after the continuous miner was removed, but claims that the area was "dangered off" by a timber set in the middle of the entry by Busch and Cross who allegedly wrote the word "Danger" on that timber. Clinchfield's brief quotes the testimony of both Busch and Cross in support of its claim that a timber was set in the entry after the continuous miner was removed, but the setting of the timber is not corroborated by any other witness. The preshift examiner, who claims to have seen a reflectorized can hanging in the No. 5 entry, did not mention seeing the timber. The Virginia mine inspector, who allegedly saw the can, did not mention the timber. None of the three inspectors who were in the fall area saw the timber. Clinchfield's safety director, who was in the fall area, did not mention the timber.

Clinchfield's brief (pp. 7-8) quotes from the testimony of both Busch and Cross in supporting its claim that a breaker bearing the word "Danger" had been set outby the fall area, but Clinchfield's brief (p. 7) drops a very significant sentence from the beginning of Busch's statement and indents the quotation to make it appear that the quotation is the complete answer given by Busch. That omitted sentence reads "I'm not for sure." In the remaining part of Busch's statement about the setting of the timber he uses the word "believe" and the phrase "pretty sure".

Cross is not very positive in asserting that he set a timber with the word "Danger" written on it. Clinchfield's brief (p. 7) also quotes from Cross' testimony with an indentation which makes it appear that the entire statement is given. Significantly, however, before Cross made the portion of his statement quoted on page 7 of Clinchfield's brief, he testified as follows (Tr. 215):

> A Charlie and his men wanted to check how much damage was done [to] it. So Logan [Busch] and I went back to -- of course, we helped them move it down some first -- we went back up to the crosscut. And, to the best of my knowledge, we set one timber

with the phrase "to the best of my knowledge". Busch was more forthright than Cross about the setting of the timber in that he just made a flat announcement at the beginning of his statement that he was "not for sure". The purpose of a timber with the word "Danger" written on it is to warn persons of a hazard. That timber would accomplish no purpose if no one is able to find it. Yet, as indicated above, at least three of Clinchfield's witnesses and all four of the Secretary's witnesses were in the crosscut where the alleged timber was supposed to have been set and not one of them ever saw the timber. Therefore, i find that the preponderance of the evidence fails to support a conclusion that a timber with the word "Danger" on it was ever set in the crosscut.

One further point needs to be made with respect to the alleged timber with the word "Danger" on it. Paragraph 19(b) of Clinchfield's roof-control plan provides as follows (Exh. C, p. 9):

> (b) All roof falls and other areas in the active workings where the mine roof material has been removed from its natural location by any means and is not being cleaned up shall be posted off at each entrance to the area by at least two rows of posts (or the equivalent) installed on not more than 5-foot centers across the opening. [Emphasis supplied.]

In the quotation of Cross' testimony above, he stated that "* * [w]e were going to breaker it off" but that since they were running close on time, he thought they might have set one timber with the word "Danger" written on it. Cross was a supervisor with 18 years of experience and his testimony shows that he knew he should have set at least two rows of posts in conformance with the roof-control plan to "breaker off" the crosscut, but he let the fact that he was running close on time cause him to omit taking the safety precaution required by the roof-control plan. One of the reasons that the inspectors issued the imminent danger order was the fact that they could find no indication that Clinchfield had erected any danger signs to warn miners either to stay out of the hazardous crosscut or to approach it only with great caution.

the No. 5 entry as required by paragraph 3(a) of its roof-contro plan (Summary paragraph No. 17, supra). Clinchfield argues that since it is only required to hang such a warning device outby each place after a cut of coal is removed by the continuous mine before permanent supports are installed, that it was in compliance with its roof-control plan with respect to the unsupported brows observed by the inspectors on June 18. Although I shall hereinafter find that the reflectorized can had not been hung in this instance, Clinchfield would not have been in compliance with its roof-control plan even if the alleged reflectorized can had been hung. That argument must be rejected for at least two reasons. First, Clinchfield's roof-control plan does not envision that Clinchfield will simply hang a reflectorized can outby each working place when the continuous miner is withdrawn and leave the place unsupported for weeks at a time. On the contrary, the roof-control plan provides that temporary supports will be erected within 5 minutes after the miner has finished cutting a place, unless Clinchfield is using a roof-bolting machine equipped with an automated temporary roof-support system (ATRS). If the roof-bolting machine is so equipped, it is still expected that permanent roof bolts will be installed within a short period of time after a place has been cut. Moreover, if the ATRS bar cannot be positioned firmly against the roof, Clinchfield is then required to install temporary supports within 5 minutes after the continuous miner has completed the taking of a cut of coal (Exh. 3, pp. 5; 13-15). Since the roof in the crosscut where the roof fall had occurred formed a slant from 6-1/2 feet at the rib to 13 or 14 feet in the center of the entry, Clinchfield's ATRS bar could not have been positioned flat against the roof and Clinchfield's roof-control plan required it to install temporary supports under the brows in the crosscut, but none had been set.

The second reason for rejecting Clinchfield's claim that it had done all it was required to do under its roof-control plan to warn persons about the hazard of the unsupported brows is that paragraph 19 of its roof-control plan specifies the procedures which will be followed where a roof fall has occurred and, as indicated on page 16, supra, paragraph 19(b) required Clinchfield to install "at least two rows of posts" across both approaches to the crosscut, that is, across both the Nos. 5 and 6 entries. Clinchfield had installed such breakers across the No. 6 entry, but had done nothing to warn persons approaching the crosscut from the No. 5 entry other than to hang an alleged reflectorized can in the No. 5 entry.

Clinchfield's brief (p. 9) attempts to justify its failure to set breakers in the No. 5 entry before June 18, or to take

spector Rines said that Clinchfield had not abandoned its
tion of continued development from the face side of the r
area until after the imminent-danger order was written on
(Tr. 83; 85-86). Clinchfield does not deny that it abando
intention of development from the face side of the roof-f
after the order was issued on June 18, but claims that, u
decision to bypass the fall area was made, "* * * it was
reasonable to danger the area off with the reflectorized
the same manner miners are warned against going inby the
area where there is unsupported roof" (Br., p. 9).

In addition to the reasons I have already given for
Clinchfield's claim that it was reasonable, or even in co
with its roof-control plan, to leave the No. 5 entry outb
crosscut marked only with an alleged reflectorized can, I
as the following discussion shows, that Clinchfield faile
to hang the alleged reflectorized can.

There are a number of doubtful aspects to Vickers' t
concerning the reflectorized can which he claims to have
the No. 5 entry. First, his notation, "Danger off at fal
A), was made in the preshift book with respect to the No.
not the No. 5 entry, where he and three other witnesses c
have seen the can (Vickers, Tr. 151; Busch, Tr. 190; Cros
213; Hamrick, Tr. 251). Since Vickers first approached t
area from the No. 5 entry and claims to have seen the can
No. 5 entry, there is no obvious reason for him to have f
to make the notation about dangering off the area on the
noting hazardous conditions in the No. 5 entry, especiall
he stated on direct examination that hanging the can was
cient warning to danger off the entire fall area regardle
whether one approached it from the No. 5 or the No. 6 ent
150). Vickers did not even mention that he had also seen
flectorized can in the No. 6 entry until I asked that que
after he had failed to state that fact during both direct
cross examination (Tr. 156).

Second, Vickers took an air reading in the No. 6 ent
determining air velocity for the return entry (Tr. 151).
is no reason for him to have failed to see about eight br
posts which were erected across the No. 6 entry because t
breaker posts were observed by three of MSHA's witnesses
Clinchfield witness and were considered to be an indicati

Third, Vickers is the only witness who claims to have seen a reflectorized can in the No. 6 entry (Tr. 151; 156-157). No other witness corroborated his claim that a can had been placed in both the No. 5 and No. 6 entries (Tr. 251; 280; 318-319). Another reason to doubt Vickers' claim that he saw a can suspended from a roof bolt in the No. 6 entry is that bottom materials had been removed from the floor in the No. 6 entry which made the height from the floor to the mine roof 8 feet in the No. 6 entry, as opposed to the roof's normal height of 6-1/2 feet (Tr. 280). Vickers stated that the cans are suspended by a wire from a roof bolt and that they hang down about a foot from the roof so as to be about eye level. In describing the cans, he made no distinction about the height of the roof in the No. 6 entry as compared with the No. 5 entry (Tr. 156).

Fourth, Vickers allegedly saw the reflectorized can during his 9 p.m.-to-midnight preshift examination on June 17, but the preshift examiner who checked the 2 Left Section at 6 a.m. on June 18, or less than 8 hours later, did not indicate that he had or had not seen a danger sign in either the No. 5 or No. 6 entry. Although three MSHA witnesses testified with great certainty that the can did not exist in the No. 5 or the No. 6 entry during the day shift on June 18 when the imminent-danger order was issued, and although Clinchfield's safety director did not see the can during the day shift on June 18 (Tr. 224; 227), Vickers testified that the can was still hanging in the No. 5 entry when he made another preshift examination about 9 p.m. on June 18 (Tr. 155).

Fifth, Clinchfield's other witnesses, who heard Vickers testify that the can was hanging in the No. 5 entry on June 17 and 18, testified that the can was "still" hanging there on June 13 when they recovered the continuous-mining machine (Tr. 190; 215). Since Vickers had testified that he did not know when the can first appeared in the No. 5 entry (Tr. 155), a witness with an independent recollection of having seen the can would not be likely to refer to the can as "still" hanging there on June 13 when no one had claimed to have seen it before June 17.

The only witness called by Clinchfield's attorney who appeared to have an independent recollection of having seen the reflectorized can in the No. 5 entry was the Virginia mine inspector, Hamrick, who said that he saw the can about 10 a.m. on June 18, but Hamrick also inspected the area of the 2 Left Section inby the crosscut where the roof fall occurred and since Clinch-

as easily have seen a reflectorized can outby one of the othe face areas, rather than in the No. 5 entry outby the roof-fal area. That is especially probable in view of Hamrick's testi that he had been asked by Clinchfield's counsel about the can considerable period of time after he had been in the mine on June 18. Moreover, Hamrick said that it would not have occur to him to make a notation of having seen the can in his notes which he probably took because seeing the cans is such a comm occurrence (Summary paragraph No. 19, supra). If they are su a common occurrence and make such a slight impression on Hamr mind as not to be noteworthy, it is just as likely that he sa the can some other place in the mine during the day shift on June 18 as it is that he saw it in the No. 5 entry where thre other witnesses failed to see the can during the day shift on June 18 even though they entered the No. 5 entry just as Hamr was leaving it (Tr. 293).

On the basis of the above discussion, I find that the pr ponderance of the evidence fails to support Clinchfield's cla that a "reflectorized warning device" had been hung in the No entry prior to the time that the inspector issued imminent-da Order No. 2038802 on June 18, 1982.

Clinchfield's brief (pp. 9-11) argues at some length tha Supervisory Inspector Rines cannot support the Secretary's cl that miners were exposed to the hazards of the unsupported br when the continuous-mining machine was being removed from the roof-fall area. My discussion above has already shown that S was unwilling to state for certain that he was not exposed to possible fall of the unsupported brows when he replaced the p and valve on the continuous miner on June 13 (Summary paragra No. 15, supra). The union committeeman, Meade, stated unequi cally that a company official went out from under supported r when he was tying ropes to rocks to pull them out of the fall area (Summary paragraph No. 10, supra).

Clinchfield is correct in saying that no MSHA personnel present when the continuous miner was removed from the roof-f area on June 13 and it is true that the inspectors can only s ulate about their belief that miners were exposed to the haza of the unsupported brows when they were recovering the contin miner, but the testimony of witnesses Sauls and Meade support finding that the brows were unsupported at the time the miner recovered and that Clinchfield employees were exposed to thos hazards at the time the miner was recovered.

Koutras did not have witnesses in that case who supported the inspector's belief that a violation of section 75.200 had occurred, whereas in this proceeding, there is testimony by at least two eyewitnesses who support the inspectors' belief that miners were exposed to the hazards of the unsupported brows when the continuous miner was being recovered from the crosscut.

Interpretation of Portion of Section 75.200

The final argument made in Clinchfield's brief (pp. 12-14) is that the violation of section 75.200 alleged by MSHA cannot be proven because the unsupported brows described in the inspector's order and citation were not in an active working place and therefore their existence in the mine cannot be considered a violation of the portion of section 75.200 relied on by the inspector. As previously indicated, the portion of section 75.200 relied upon by the inspector reads as follows:

> * * * The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

Clinchfield states that the definition of "active workings" is "* * * any place in a coal mine where miners are normally required to work or travel." Clinchfield argues that no miners were "required to work or travel" anywhere in the vicinity of the roof-fall area after June 13, 1982, when the continuous miner was removed from the crosscut. Clinchfield contends that after the miner was removed on June 13, 1982, the only work done in 2 Left Section where the roof fall occurred was the moving of the continuous miner to the end of the track where it was disassembled and taken out of the mine. Clinchfield argues that the nearest active working section on June 18 when the order was issued consisted of the 1 and 2 Right Sections which were 2,000 feet away from the 2 Left Section. Clinchfield also argues that the mere fact that a preshift examiner came to the No. 5 entry outby the crosscut on June 17 and 18, 1982, cannot be considered sufficient activity to make the roof-fall area an active working place because the preshift examiner observed the reflectorized can in the No. 5 entry and the breaker posts in the No. 6 entry and did not enter the crosscut, so that it cannot be said that a miner was required to travel in the crosscut on June 18 when the order was issued.

There is conflicting testimony as to how much activity was in progress on June 18, 1982, when the order was issued. Clinchfield's Superintendent Hess stated that the continuous miner was

paragraph No. 7; Tr. 136). Moreover, Inspector Coebur the fall area on June 22 and he testified that active in progress only two crosscuts inby the roof-fall area (Tr. 128).

Even if one disregards all the conflicting eviden the extent of the activity in 1 Left Section on June 1 there is no dispute by anyone as to Vickers' contentio performed a preshift examination in the crosscut on bo and 18 and there is no dispute that another person mad shift examination on June 18 (Summary paragraph Nos. 1 supra). Both preshift examiners took an air reading i entry for the purpose of determining the velocity of t the return entry (Tr. 151; 232). The Commission found Ben Coal Co., 3 FMSHRC 608, 609 (1981), that an accumu loose coal existed in "active workings" in circumstanc the cited area was required to be inspected at least o was traveled as an escape route, and was rock-dusted p In its Old Ben decision, the Commission cited two case the former Board of Mine Operations Appeals had made r about the circumstances which constitute active workin of those cases (Mid-Continent Coal and Coke Co., 1 IBM (1972)), the former Board stated that if only one mine through an area to make an inspection, an accumulation coal dust would be a hazard to him.

Clinchfield argues that the preshift examiners sa flectorized can and did not enter the crosscut and tha therefore, not required to travel in the roof-fall are the meaning of the definition of "active workings".

Clinchfield's safety director stated that a possi way for the taking of an air reading would have been t crosscut in which the roof fall had occurred although that was not the "easiest legitimate route" (Tr. 232). Brewer thought that the preshift examiner would just a to have traveled through the crosscut to examine the r (Tr. 19). The preshift examiner who checked the 1 Lef on the morning of June 18, 1982, did not make an entry danger he may have seen in the roof-fall area and, in of his testimony, no one knows whether he traveled thr crosscut or not (Tr. 232). In any event, the continuo was actively engaged in cutting coal on June 2 when th occurred and no decision to bypass the roof fall was m

existed to warn the preshift examiners that the roof-fall area was to be avoided and, even if the reflectorized can did exist, the roof-fall area had not been cleaned up or bolted, and Clinchfield was obligated under paragraph 19(b) of its roof-control plan to install two rows of posts across the crosscut at the No. 5 entry. As the Commission stated in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981):

> * * * The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard. * * *

The Commission also held in Penn Allegh Coal Company, Inc., 4 FMSHRC 1224, 1227 (1982) that a judge is not bound by the opinions of any single witness, but should base his legal conclusions "* * * upon the evidence of record considered as a whole." I have hereinbefore thoroughly reviewed all of the evidence presented by both Clinchfield and the Secretary and conclude that Clinchfield did violate section 75.200 because it had left hazardous unsupported brows in the crosscut between the Nos. 5 and 6 entries on the 2 Left Section without supporting them or otherwise controlling them adequately to protect persons from falls of the roof or ribs as required by section 75.200 of the Act. The area was within an active working place and miners were traveling in the area to make preshift examinations.

The Issue of Whether an Imminent Danger Existed

Alleged Dangering Off

Clinchfield's brief (pp. 15-20) argues that the unsupported brows observed by Inspector Brewer did not constitute an imminent danger because the crosscut where the brows existed had been dangered off and no mining activity was in progress on the 2 Left Section. As to Clinchfield's claim that the area had been dangered off, I incorporate in this portion of my decision the discussions on pages 15-16 and 18-20, supra, in which I found that neither the reflectorized can nor the timber with the word "Danger" written on it ever existed at the intersection of the No. 5 entry and the crosscut in which the unsupported brows were observed by the inspector.

Assuming, arguendo, that the reflectorized can and timber had been erected by someone at sometime, the fact remains that

that the unsupported brows had been dangered off to prevent persons from going into the crosscut where the brows could fall upon them. Also, as I have previously explained on pages 16-17, supra Clinchfield was required by paragraph 19(b) of its roof-control plan to install two rows of posts across the entrance to the roof fall area at the No. 5 entry approach and it had failed to do so. Moreover, even if a reflectorized can and a "Danger" timber had been placed at the intersection of the No. 5 entry and the hazardous crosscut, it was Clinchfield's responsibility to assure that those warning devices continued to remain in a conspicuous place where they could be seen by persons who might have gone into the crosscut.

The excerpt on page 18 of Clinchfield's brief to the testimony of its witness Vickers who testified that a reflectorized can is "* * * just like a stop sign is to a driver out on the highway" has no force and effect because a stop sign on the highway, which a motorist cannot find, does not warn a motorist of a dangerous intersection any more than a can, which a miner cannot find, warns a miner of a hazard in a coal mine. For the reasons given above, I must reject Clinchfield's defense to the issuance of the imminent-danger order to the extent that its defense is based on the claim that it had properly dangered off the roof-fall area where the imminent danger existed.

Removal or Nonexistence of Persons Did Not Eliminate Imminent Dan

The remaining arguments raised in Clinchfield's brief (pp. 19-20) in support of its claim that no imminent danger existed in the roof-fall area reveal a basic misunderstanding on Clinchfield's part as to what constitutes an imminent danger under the Act. That misunderstanding is most clearly expressed on page 20 of Clinchfield's brief where it is contended that there was "* * no activity present in the area which could constitute an imminent danger at the time the 107(a) order was issued". It is clea from the foregoing quotation that Clinchfield believes that no imminent danger can be found to exist unless at least one person is actually engaged in some type of work so close to the imminent danger that he will probably be killed before the imminent danger can be abated. Clinchfield is confusing the nonexistence of persons in the vicinity of the imminent danger with the nonexistence of the hazard which produces the imminent danger.

Clinchfield's confusion is obvious from the facts in the cases which it cites in support of its argument that the removal of persons from the imminent danger abates the imminent danger. On page 19 of its brief, e.g., Clinchfield cites Old Ben Coal Co.

was issued, riding on top of a locomotive with his legs hanging over the side of the locomotive. The Board agreed with the judge that the imminent danger no longer existed at the time the order was written because the miner had jumped off the locomotive.

Clinchfield claims that the Board's rationale in the Old Ben case applies to the facts in this case because no actual coal production was in progress and no one had any reason to be in the crosscut where the unsupported brows existed. The fallacy in Clinchfield's argument is that when the miner jumped off the locomotive in the Old Ben case, he eliminated the existence of the imminent danger at the time he jumped off the locomotive because the imminent danger was coexistensive with the miner's presence on the locomotive, whereas in this proceeding, the imminent danger continued to exist after the inspector wrote his order, regardless of the fact that no person was observed by the inspectors to be standing under the unsupported brows. Thus, nonexistence of persons in the roof-fall area did not automatically abate or terminate the existence of the imminent danger.

Another case which Clinchfield mistakenly cites in support of its claim that no imminent danger existed is Judge Boltz's decision in C F & I Steel Corp., 3 FMSHRC 99 (1981), in which Clinchfield states that the judge vacated an imminent-danger order "* * * because prior to its issuance the operator had removed miners from the area, ceased production work in the affected section and no power was energized in that section" (Brief, p. 20). Judge Boltz himself explained the difference between abating an imminent danger and removal of persons from the proximity of the imminent danger in his decision in another C F & I case, 3 FMSHRC 2819 (1981) as follows (at p. 2823):

> I would characterize the holding of the first cited case somewhat differently. Pittsburgh Coal Company, supra, [2 IBMA 277 (1973)] stands for the proposition that the presence of 1.5 volume per centum or more of methane will support the issuance of an imminent danger withdrawal order. Id. at 277, 279. The Valley Camp Coal Company, supra, [1 IBMA 243 (1972)] stands for the proposition that an order of withdrawal can properly be issued if no miners are in the mine because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated. Id. at 248. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, supra, [3 FMSHRC 99 (1981)] I concluded that

should be affirmed.

Clinchfield also mistakenly cites Judge Koutras' decision in Climax Molybdenum Co., 2 FMSHRC 2976 (1980), in support of its claim that removal of miners from a hazardous area eliminate or abates an imminent danger. It is true that Judge Koutras vacated an imminent-danger order in the Climax case but he vacat the order primarily because the inspector was not sure that the exposed electrical connections cited in the order would have shocked or killed any person who might have touched them--not because the miners closest to the wires were 500 to 600 feet fro the alleged imminent danger (2 FMSHRC at 2980).

In its reply brief (pp. 2-11), Clinchfield cites additional cases in support of the same arguments which I have rejected above. For example, on page 7 of its reply brief, Clinchfield quotes from the former Board's decision in Eastern Associated Coal Corp., 2 IBMA 128 (1973), in which the Board stated at page 137, "* * * a condition or practice cannot be imminently dangerous if the specific and usual mining activity can safely continue in the area during (or prior to) the abatement process". Clinchfield then argues as follows (Brief, p. 7):

> * * * In the present case, the condition was abated through the dangering off of the area in question, but it could also have been abated through the resumption of the normal mining operations. Either way, miners were protected against any reasonable expectation that the condition could cause death or physical harm to a miner."

Neither of the conclusions made by Clinchfield in the above quotation is correct. The hazardous condition created by the existence of the unsupported brows was not eliminated by Clinchfield's alleged dangering off of the roof-fall area. Again, assuming arguendo, that the roof-fall area had been dangered off by the erection of a warning device, that action had no salutary effect whatsoever on the hazardous nature of the unsupported brows. They would have remained just as likely to fall on any person entering the area after the alleged warning device was erected as they would before the warning device was erected.

that an imminent-danger order is to remain in effect "* * * until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." Rines said that Clinchfield never did abate the imminent danger cited in the order, but they terminated it at Clinchfield's request after the inspectors had personally participated in erecting posts and nailing boards on the posts to make certain that no miners could enter the roof-fall area.

As for Clinchfield's claim that the roof-fall area would have been supported if a decision had been made to continue mining in that area, it is obvious that no one could have started cutting coal under the brow in the No. 6 entry without first installing permanent roof supports to assure that the brows would not fall. Since the roof and brows were too hazardous for normal mining operations to begin before the brows and roof had been supported, the former Board's statement in the Eastern Associated case, supra, does not apply to the facts in this case because the "usual mining activity" could not have been carried on while the mine roof and brows were being restored to an acceptable condition of safety.

Another case which Clinchfield cites in its reply brief (P. 9) is Judge Carlson's decision in Western Slope Carbon, Inc. 5 FMSHRC 795 (1983), in which Clinchfield claims that Judge Carlson held that before an accumulation of float coal dust can be considered to be an imminent danger, the coal dust must be in suspension. Judge Carlson merely noted that both suspension of the dust and a spark would all have to be present before an explosion could occur. The primary reason that the judge failed to find occurrence of an imminent danger was MSHA's lack of proo as to the existence of an ignition source (5 FMSHRC at 799). Additionally, it should be noted that the court in Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974), specifically rejected the operator's argument in that case that a finding of imminent danger could not properly be made in the absence of a suspension of float coal dust in the air, an ignition source, and a concentration of methane.

Section 3(j) Definition and "Probable As Not" Gloss

Clinchfield's initial brief (p. 15) does correctly quote the definition of an imminent danger given in section 3(j) of the Act, i.e., "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before

Order No. 2038802 was issued. The unsupported brows could reasonably have been expected to cause death or serious physical harm before such brows could be adequately supported.

The former Board augmented the definition of section 3(j) in its decision in Freeman Coal Mining Co., 2 IBMA 197 (1973), as follows (at p. 212):

> [w]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. * * *

The Seventh Circuit affirmed the Board's definition and finding of an imminent danger in the Freeman case previously discussed above. Therefore, the Board's expanded definition of imminent danger is a part of the present law pertaining to imminent danger. In Pittsburg & Midway Coal Mining Co., 2 FMSHRC 787 (1980), the Commission affirmed a judge's decision finding existence of an imminent danger. In doing so, however, the Commission made the following observation (at p. 788):

> * * * In this regard, we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. * * *

I am not aware of any case in which the Commission has expressed a further opinion as to the definition of imminent danger, but I believe that my findings of an imminent danger in this proceeding would be supported by the preponderance of the evidence regardless of whether the original language of section 3(j) is used or the "as probable as not" standard is applied. Inspector

the area as an active working place because the miners were still working on the continuous miner which had been removed from the roof-fall area in order for the miners to work on the section for any purpose, that he felt the brows posed an imminent hazard to anyone who might go into the roof-fall area (Tr. 17), that he knew there had been three unintentional roof falls in the Hurricane Creek Mine in the last year which had covered up continuous miners, and that with that background of knowledge, the existence of unsupported, overhanging, arching brows triggers the feeling, "if you're a coal miner", that an imminent danger exists (Tr. 18). The inspector further testified that he issued the imminent-danger order to assure that the only miners who would be sent into the roof-fall area would be going there solely to correct the hazards associated with the existence of the unsupported brows (Tr. 20).

On cross-examination the inspector stated that if normal mining operations had resumed, a section foreman, a continuous-miner operator, a helper, and a shuttle-car operator, would be exposed to the hazards caused by the unsupported brows (Tr. 49). Although the inspector agreed that no actual mining operations were in progress in the 2 Left Section on the day the order was issued, he said that there was no mining activity at that time because the continuous miner was torn up and the miners were waiting to get an operative machine on the section. He further stated that his concern was that the continuous miner might be repaired and that active mining would occur by that evening (Tr. 50).

As a matter of fact, when Inspector Coeburn was in the roof-fall area on June 22, he stated that active mining was in progress only two crosscuts inby the roof-fall area and Mine Superintendent Hess agreed that the 2 Left Section had been developed inby the roof-fall area and that the decision to bypass the roof-fall area had been made only after the imminent-danger order was issued (Tr. 128; 266; 268).

The preponderance of the evidence, therefore, shows that it was just as probable as not that the unsupported brows would have fallen on one or more miners and would have injured or killed them if normal mining activities had been resumed before the brows were properly supported. Although Clinchfield argues in its reply brief (p. 10) that the first action that would have been taken if normal mining activities had been resumed in the roof-fall area would have been to support the roof properly, that is not an eventuality which the inspectors could leave to doubt. It is a fact that the two rows of posts required by

wait until the danger is immediate because then no one could stay in the mine to correct the hazardous conditions which he has found (523 F.2d at 34).

For the reasons hereinbefore given, I find that imminent-danger Order No. 2038802 was properly issued on June 18, 1982, under section 107(a) of the Act and it will hereinafter be affirmed.

Docket No. VA 83-24

The Issue of What Civil Penalty Should Be Assessed

Penalty Proceedings Before Commission and Judges Are De Novo

Since I have already found in the preceding portion of this decision that a violation of section 75.200 occurred because Clinchfield had failed to support the brows in the crosscut between the Nos. 5 and 6 entries in the 2 Left Section after the continuous-mining machine was recovered from the roof-fall area on June 13, 1982, it is necessary that I assess a civil penalty pursuant to the six criteria which are listed in section 110(i) of the Act (Tazco, Inc., 3 FMSHRC 1895 (1981)). The parties entered into stipulations which govern two of the criteria. First, it was stipulated that imposition of a civil penalty would not affect Clinchfield's ability to continue in business. Second, it was stipulated that Clinchfield is a medium-sized company and that the Hurricane Creek Mine here involved is a medium-sized mine.

Respondent's initial brief (pp. 21-23) requests that the Secretary's special assessment proposed under 30 C.F.R. § 100.5 be vacated if I should find that there is any merit to the Secretary's allegation that a violation of section 75.200 occurred. When an operator requests a hearing before one of the Commission administrative law judges in a civil penalty proceeding, the proceeding is de novo and the judge is required to assess a penalty under the six criteria listed in section 110(i) of the Act without giving any consideration to the Secretary's proposed penalty or the procedures utilized by the Secretary to arrive at his proposed penalty (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U. S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

Inasmuch as it is necessary for me to make findings concerning the four criteria as to which the parties entered into no stipulations, I shall consider the merits of Clinchfield's arguments pertaining to those four criteria without expressing any opinion as to the merits of the findings made by the Secretary in reaching his proposed penalty.

The Secretary's brief requests that I assess the civil penalty of $3,000 proposed by the Secretary in Docket No. VA 83-24, but the Secretary supports the proposed penalty by relying upon the evidence introduced in this proceeding. Therefore, it is appropriate to consider the Secretary's arguments also, but those arguments will likewise be evaluated without giving any opinion as to whether I agree or disagree with the findings made by the Secretary in arriving at his special assessment of $3,000.

History of Previous Violations

Neither Clinchfield's initial brief (pp. 21-23) nor its reply brief (p. 12) specifically discusses the criterion of Clinchfield's history of previous violations. The Secretary's brief (p. 16) asserts that the criterion of history of previous violations was a matter of stipulation, but the only transcript reference the Secretary makes in support of that assertion is to page 140 of the transcript where Clinchfield's counsel did not object to the introduction of Exhibit 5 which is a computer printout listing prior violations at the Hurricane Creek Mine. Exhibit 5 shows that Clinchfield has previously violated section 75.200 on five occasions prior to June 18, 1982, when the violation here involved was cited. One of those prior violations was assessed under MSHA's single penalty assessment procedure and the penalty paid was, therefore, only $20. Section 100.3(c) states that previous violations assessed under the single penalty provisions of the regulations will not be used in evaluating the criterion of history of previous violations, but as I indicated above, penalty assessments in cases before the judges are de novo and I am not bound by the Secretary's penalty procedures described in section 100.3 of the regulations. Moreover, it should be noted that section 110(i) of the Act appears to give the Secretary a considerable amount of flexibility in proposing penalties, whereas section 110(i) specifically provides that the Commission "shall" consider all six criteria in determining civil penalties.

I consider violations of section 75.200 to be among the most serious violations which can occur in coal mines because roof falls still account for a large number of deaths in coal mines every year. An operator should conscientiously follow its roof-control plan and all other provisions of section 75.200

As to the criterion of negligence, the Secretary's brief (p. 16) claims that Clinchfield showed a high degree of negligence in failing to support the brows. The Secretary argues that Clinchfield could have bolted the unsupported brows prior to removal of the continuous miner and notes that 5 days after the removal of the miner, the brows were still unsupported when the roof-fall area was examined by MSHA's inspectors and no danger signs could be found. Clinchfield's reply brief (p. 12) argues that the miners were not exposed to the unsupported brow when they recovered the continuous miner.

In its initial brief (pp. 21-22), Clinchfield argues that it was not negligent because it had posted a warning device (reflectorized can) in accordance with its roof-control plan. Clinchfield cites the testimony of Busch, Cross, Vickers, and Hamrick in support of its contention that the reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut in which the unsupported brows existed, but I have heretofore given on pages 15-16 and 18-20, supra, my reasons for finding that the reflectorized can and timber with the word "Danger" written on it did not exist. Clinchfield additionally argues that if I should find that the designated area was not properly dangered off, I should take into consideration that such failure to danger properly was the result of a misinterpretation of the regulations, rather than an indication of negligence for which Clinchfield should be severely penalized.

It is difficult to understand why Clinchfield was as little concerned about supporting the brows as the evidence in this case indicates. I have already alluded to the fact that even if a reflectorized can had been hung at the intersection of the No. 5 entry and the crosscut containing the unsupported brows, it was incumbent upon Clinchfield's management to assure itself that the "warning device" continued to remain situated where it could be seen by anyone coming into the roof-fall area to make a preshift examination. The evidence clearly shows that only one preshift examiner made any notation about the dangering off of the roof-fall area and he did not make that notation until June 17, 1982, or 4 days after the continuous miner was removed from the crosscut. The next morning, June 18, three MSHA witnesses and Clinchfield's safety director could not find that "warning device" even though MSHA's witnesses specifically looked for some sort of warning to advise miners as to the hazardous nature of the unsupported brows.

The record does not contain any explanation to show why Clinchfield's mine foreman or mine superintendent would have

after the imminent-danger order had been issued (Tr. 266). Also, as I have previously noted on pages 16-18, supra, Clinchfield's roof-control plan required it to install two rows of posts outby the roof-fall area since it had not gone in and cleaned up the crosscut. Even if one accepts Clinchfield's argument that management had not decided whether to bypass the roof-fall area entirely or to go in and support the area and continue mining there, that is still no reason for Clinchfield to leave the area without at least installing the two rows of posts which are required to be installed outby a roof-fall area if the area has not been cleaned up (Exh. C, par. 19(b)).

In light of the above discussion, I can find no mitigating circumstances to soften a conclusion as to Clinchfield's negligence in failing to support the hazardous brows or, in the alternative, at least making certain that the area was continually marked by a highly visible warning device or two rows of posts. The preponderance of the evidence supports a finding that Clinchfield was grossly negligent in allowing the violation of section 75.200 to occur. Therefore, I find that $2,000 of the penalty should be assessed under the criterion of negligence

Gravity

The Secretary's brief (pp. 15-16) argues, as to the criterion of gravity, that the violation was very serious. The Secretary states that the miners doing recovery work on the continuous miner were exposed to the unsupported brows, that one of Clinchfield's division superintendents went out from under supported roof when he was wrapping a rope around rocks to drag them from the roof-fall area, and that the brows were left unsupported on June 13 after the continuous miner was recovered, thereby exposing any miner who might pass through the crosscut to the immediate hazard of the unsupported brows.

Clinchfield's reply brief (p. 12) claims that the miners were not exposed to the unsupported brows when they were recovering the continuous miner on June 13 and that the Secretary has improperly alleged that the violation existed on June 13 because the inspectors were not present when the continuous miner was being recovered and therefore can only speculate as to what occurred on June 13. It must be borne in mind that the violation of section 75.200 is for not supporting the brows or otherwise controlling them adequately to protect persons from falls of the roof or ribs. The violation began to exist on

course, interpreting section 75.200 to mean that the p
barricades were sufficient to control the area so as to
persons from a fall of the unsupported ribs.

The evidence conclusively shows beyond any doubt t
brows began to be unsupported on June 13 because Clinch
witnesses stated that no bolting was done in the roof-f
except with the stoper, that all bolting was done befor
continuous miner was recovered, and that no bolting was
after the miner was removed from the crosscut (Tr. 189;
209). Since no witness has been able to refute the ins
finding that the brows were unsupported, the violation
tion 75.200 existed on June 13 and continued to exist u
June 22 when the inspectors and Clinchfield's employees
caded the area to prevent persons from entering the are

I have already discussed the fact that the crosscu
feet wide and that the overhanging brows extended out f
ribs toward the center of the crosscut for a distance o
9 feet from both the right and left sides of the crossc
such circumstances, anyone installing parts on the side
continuous miner, which was from 10 to 11 feet wide, wa
sarily exposed to the hazard of having the unsupported
fall on him (Tr. 208). Sauls' testimony shows that he
positive but that he was exposed to the hazards of the
ported brows (Tr. 207). Busch stated that he considere
fact that the left brow might fall at the very moment h
tramming the continuous miner from the roof-fall area (
204). Finally, Meade testified that he saw one of Clin
officials go inby all supports to attach ropes to rocks
they could be pulled from the roof-fall area (Tr. 132).

The hazards associated with the unsupported brows
be divorced from a realization that they were the remai
tion of roof surrounding an area of roof which had fall
suddenly on June 2 that two miners were killed before t
escape the falling rock. There was still a crack on th
rib which was sufficiently obvious to be of concern to
miner who was tramming the machine out of the fall area
June 13. The evidence, therefore, supports a finding t
unsupported brows continued to pose a threat to anyone
pass through the crosscut.

Clinchfield argues in its initial brief (p. 22) th
if I find that the brows constituted a hazard, that it
improper to accept Inspector Brewer's evaluation to the
that four miners (operator and helper on continuous min
shuttle car operator, and section foreman) would have b
posed to injury or death if the brows had fallen. Clin

of the roof-fall area and that if normal mining activities had been resumed, the number of people exposed would have been only the number of miners required to support the roof in accordance with Clinchfield's roof-control plan.

It is possible, of course, that the number of miners who would have been required to support the roof properly would involve more than the operator and helper on the roof-bolting machine, but that is a matter which was not discussed during the hearing. Consequently, there is no evidence to show that the inspector properly concluded that if Clinchfield had succeeded in repairing the continuous miner by the evening shift on June 18, its employees would have trammed the continuous miner back into the crosscut and resumed cutting coal without giving any consideration at all to the fact that the area of the crosscut nearest to the No. 6 entry was completely unsupported and the fact that a 9-foot square area of roof immediately outby the face of the No. 6 entry was not bolted or otherwise supported.

It is a fact that the continuous miner was so badly damaged by the roof fall that it had to be entirely removed from the mine for rebuilding in Clinchfield's central shop. Therefore, the most likely injury or death which would have occurred on June 18, if the brows had fallen, would have been to cause injury to a preshift examiner who might have passed through the crosscut for the purpose of taking an air reading to compute air velocity in the No. 6 return entry. When the continuous miner was recovered on June 13, only Sauls was exposed while the pump and valve were replaced, and when the actual tramming of the miner began, only Busch was operating the controls. When the rope was being tied to rocks inby any roof supports, only Clinchfield's mine official was exposed. The preponderance of the evidence, therefore, supports a finding that any fall of the brows on June 13, or thereafter, up to and including the time the violation was cited on June 18 would have been one person. Nevertheless, if the brows had fallen, they would have been likely to kill anyone on whom they might have fallen. In such circumstances, the violation must necessarily be considered to be very serious and I find that $1,000 of the penalty should be assessed under the criterion of gravity.

Good-Faith Abatement

The sixth and final criterion remaining to be considered is whether Clinchfield made a good-faith effort to achieve rapid compliance after the citation was written. The Secretary's brief (p. 16) alleges that "[n]o good faith was shown concerning

June 18, after the order was written to abandon the affected por tion of the No. 6 entry. Clinchfield contends that the aforesai actions should be given consideration because, although the orde was not terminated until December 6, 1982, Supervisory Inspector Rines agreed that all the actions summarized in the order of termination as reasons for terminating it had been taken by June 22, 1982 (Tr. 104-105).

When inspectors issue orders, they normally withdraw person nel from the area of danger and the orders do not specify a time within which the hazards have to be corrected because it is assumed that the operator's having to withdraw personnel from the area of danger will be a sufficient incentive to cause the operator to take immediate corrective action. Since the violation here involved was written as part of an imminent-danger order, the inspector did not insert any time in his order to show when the violation of section 75.200 was required to be abated (Exh. 1, p. 1). Consequently, even though Clinchfield did nothing to barricade the roof-fall area between June 18 and June 22 when the barricades were constructed, it must be borne in mind that the order was written on a Friday and the barricade were constructed on a Tuesday. In the interim between Friday an Tuesday, the area was dangered off by the tags hung outby the fall area by Inspector Brewer. In such circumstances, it can hardly be found that Clinchfield showed a lack of good faith in abating the violation because there may have been some understandable confusion in the minds of Clinchfield's management as to what action it needed to take after the area had been dangere off by the inspector's imminent-danger order.

For the foregoing reasons, I find that Clinchfield showed good faith in abating the violation by agreeing with MSHA's personnel that physical barricades should be constructed despite the fact that Clinchfield's roof-control plan required the construction of only two rows of timbers outby the roof-fall area. The fact that Clinchfield's management had decided to bypass the No. 6 entry, rather than continue mining from the face side wher the roof-fall had occurred, is another reason to accept Clinchfield's argument that it was not required to take any action toward abating the violation other than agreeing to construct the physical barricades on each side of the roof-fall area on June 2

Clinchfield made a good-faith effort to achieve rapid compliance the penalty otherwise assessable in this proceeding will not be increased or decreased under the criterion of good-faith abatement.

Total Assessment

By way of summary, a medium-sized operator is involved, payment of penalties will not cause it to discontinue in business, there was a somewhat adverse history of previous violations of section 75.200, the violation was associated with gross negligence, the violation was very serious, and there was a good-faith effort to achieve rapid compliance. The operator's size was taken into consideration in indicating that a penalty of $400 would be assessed under the criterion of history of previous violations, that $2,000 would be assessed under the criteric of negligence, and that $1,000 would be assessed under the criterion of gravity. Therefore, a total penalty of $3,400 will hereinafter be assessed for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

WHEREFORE, it is ordered:

(A) Clinchfield Coal Company's application for review of Order No. 2038802 filed on July 19, 1982, in Docket No. VA 82-51R is dismissed and Order No. 2038802 dated June 18, 1982, is affirmed.

(B) Clinchfield Coal Company shall, within 30 days from the date of this decision, pay a civil penalty of $3,400 for the violation of section 75.200 alleged in Order and Citation No. 2038802 dated June 18, 1982.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Fletcher A. Cooke, Esq., Clinchfield Coal Company, P. O. Box 4000, Lebanon, VA 24266 (Certified Mail)

David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 81-393-M A/C No. 42-00149-05017 F
v.	:	Utah Copper Division
KENNECOTT MINERALS COMPANY, UTAH COPPER DIVISION, Respondent	:	

DECISION

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent Kennecott Minerals Company with violating Title 30, Code of Federal Regulations, Section 55.9-20, a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 80 et seq. (the "Act").

A hearing on this case and related cases involving the parties commenced in Salt Lake City, Utah on September 20, 1

At the hearing the petitioner moved to amend his propos civil penalty by reducing it to $700 from $1,000.

As grounds therefor the petitioner states the negligence the operator was less than originally assessed. (Tr. 8).

In view of the amendment respondent moved to withdraw i notice of contest. (Tr. 9-10).

For good cause shown and pursuant to Commission Rule 29 C.F.R. 2700.11 the motions are granted and I enter the follo

ORDER

1. Citation 576293 and the proposed penalty, as amende the amount of $700, are affirmed.

2. Respondent is ordered to pay said sum within 30 days the date of this decision.

John J. Morris
Administrative Law Judge

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EARNEST GADDY, Complainant	:	DISCRIMINATION PROCEEDING Docket No: CENT 81-258-DM (MD 81-83)
v.	:	
ANCHOR STONE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Moore

The parties have reached a settlement in the above that is satisfactory to each. I approve the settlement.

Respondent is accordingly ORDERED to pay forthwith the sum of $7,436.96 to Mr. Gaddy. The case is DISMISSED.

Charles C Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution:

Mr. Earnest R. Gaddy, 136 No. 108th East Avenue, Collinswood, OK 74021 (Certified Mail)

Charles S. Plumb, Esq., Doerner, Stuart, Saunders, Daniel & Anderson, 1200 Atlas Life Building, Tulsa, OK 74103 (Certified Mail)

Ronnie A. Howell, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Dallas, TX 75202 (Certified Mail)

SECRETARY OF LABOR,	:	CIVIL PENALTY P
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT
	:	A. C. No. 15-12
v.	:	
	:	
R.F.H. COAL COMPANY,	:	No. 1 Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on Octobe 1983, in the above-entitled proceeding a motion for app settlement. Under the settlement agreement, respondent pay civil penalties totaling $10,000 instead of the pen totaling $47,580 proposed by the Mine Safety and Health istration.

There are unique circumstances which warrant the a of greatly reduced penalties in this proceeding. The N was operated by five members of a single family. On Ja 1982, four of the family members and three employees we ground and the remaining member of the family was on th of the mine when an enormous explosion occurred at the faces. The explosion was propagated to the surface of and the force of the explosion was so great that it kil seven persons working underground and completely destro considerably damaged all mining equipment in its path, equipment on the surface of the mine. Respondent's own the widows of the four family members who were killed i plosion with the exception of one owner who lost her br three uncles in the tragedy.

Financial data submitted by respondent's counsel i that the mine had no taxable income in the last year of eration. The mine in which the explosion occurred has manently abandoned and sealed and the corporation has n tion of reentering the coal business at any time in the In such circumstances, the payment of civil penalties a to $10,000 will undoubtedly be adequate to serve as a d against future violations of the mandatory health and s standards as intended by the Federal Mine Safety and He of 1977. The untimely death of four members of the sam the oldest of whom was only 39 years of age, will likew main as a permanent and painful memory for all persons

have been shown to exist in this proceeding.

The motion for approval of settlement has proposed an allo-
tion of the $10,000 in settlement penalties among the eight
olations alleged in the pertinent orders and citations in a
nner which is appropriate if one takes into consideration the
ner five criteria listed in section 110(i) of the Act.

According to MSHA's report of the underground explosion
ich occurred on January 20, 1982, the cause of the explosion
s the firing of an explosive charge in the No. 6 entry which
ew flames into the No. 5 entry in which coal dust was still in
spension from a prior explosives shot. MSHA's investigators
und reason to believe that an inadequate amount of rock dust
d been applied outby the entry in which the dust explosion
curred because the explosion was propagated from the face area
the mine clear to the surface of the mine. MSHA also found
at a contributing factor to the explosion was respondent's
ilure to erect brattice curtains to within 10 feet of the work-
g faces. Additional contributing factors were omission of
emming materials in the boreholes and insertion of excessive
antities of explosives in each borehole.

One of the violations pertained to failure to store explo-
ves in the proper manner and place, but since the improperly
ored explosives did not have anything to do with the explosion
ich occurred on January 20, 1982, MSHA did not recommend a
rge penalty for that alleged violation. Likewise, the alleged
olation pertaining to the existence of cigarettes, cigarette
ghters, and cigarette butts in the mine was not assigned a
rge penalty because there was no evidence that a lighted cig-
ette had contributed to the cause of the explosion. The motion
r approval of settlement has appropriately allocated the larg-
t portions of the settlement penalties to the alleged viola-
ons which seem to have contributed most to the cause of the
olosion.

The above discussion shows that MSHA appropriately evaluated
e two criteria of gravity and negligence in determining its
oposed penalties. MSHA also considered the criterion of whe-
er the operator showed a good-faith effort to achieve rapid
mpliance by noting that all of the alleged violations were
ated when the respondent permanently abandoned and sealed the
ne.

penalty points under the penalty formula described in 30 C.F.R. § 100.3. The sixth and final criterion to be considered is respondent's history of previous violations. The proposed assessment sheet indicates that respondent was cited for only one violation of the mandatory health and safety standards prior to the writing of the citations and orders involved in this proceeding. That is a very favorable history of previous violations and warrants assignment of zero penalty points under section 100.3(c) of the penalty formula used by MSHA.

The discussion above shows that the large penalties proposed by MSHA were based primarily upon the criteria of gravity and negligence associated with the alleged violations, but MSHA could hardly have proposed smaller penalties than it did in light of the disastrous consequences of the violations which were described in the citations and orders and in MSHA's accident report. Therefore, I conclude that MSHA appropriately proposed the penalties hereinbefore discussed and that the parties' settlement agreement should be approved for the reasons heretofore given.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed October 1[3], 1983, is granted and the parties' settlement agreement is approved.

(B) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $10,000.00 which are allocated to the respective alleged violations as follows:

Citation No. 1196101 4/16/82 § 75.316	$ 1,400.00
Order No. 1196102 4/16/82 § 75.401	1,300.00
Order No. 1196103 4/16/82 § 75.1306	500.00
Citation No. 1196108 4/16/82 § 75.1702	160.00
Order No. 1196112 4/16/82 § 75.1303	2,350.00
Order No. 1196112 4/16/82 § 75.400	2,350.00
Order No. 1196112 4/16/82 § 75.403	1,520.00
Citation No. 1196141 4/16/82 § 75.304	420.00
Total Settlement Penalties in This Proceeding	$10,000.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

d Turner, Jr., Esq., Turner, Hall & Stumbo, P.S.C., Attorney
.F.H. Coal Company, Hall-Ranier Building, 15 South Lake
, Prestonsburg, KY 41653 (Certified Mail)

OCT 19 19

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. PENN 83-40
	:	A.C. No. 36-05018-03506
v.	:	
	:	Cumberland Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: David A. Pennington, Esq., Office of the Sol
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylv
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In the above proceeding, the Secretary seeks civil per
for three alleged violations of mandatory safety standards.
of the violations was originally cited as significant and s
stantial. However, at the hearing, the Secretary moved to
the significant and substantial designation removed from Ci
No. 2011911, charging a violation of 30 C.F.R. § 75.400, ar
Citation No. 2011829, charging a violation of 30 C.F.R. § 7
Pursuant to notice the case was heard in Pittsburgh, Pennsy
on August 30, 1983. Clarence Moats and Ferdinard Spoljaric
testified on behalf of Petitioner; Charles Lemunyon and Bar
Nelson testified on behalf of Respondent. Each party filed
posthearing brief. Based on the entire record and consider
contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. Respondent is the owner and operator of an undergr
coal mine in Greene County, Pennsylvania, known as the Cumb
Mine.

Respondent produces approximately 15 million tons annually. Respondent is a large operator.

4. In the 24-month period prior to the issuance of the citations involved herein, 464 violations were assessed at the subject mine, 293 of which were designated significant and substantial. Seventy of these violations were of 30 C.F.R. § 75.400, 51 of which were designated significant and substantial. Two violations of 30 C.F.R. § 75.701 were cited during the same 24-month period. This is a moderate history of previous violations, and penalties otherwise appropriate should not be increased because of it.

5. The imposition of civil penalties in this proceeding will not affect Respondent's ability to continue in business.

6. In the case of each citation involved herein, the violati was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

8. The subject mine is classified as a gassy mine. It liberates in excess of 4,900,000 cubic feet of methane in a 24-hour period.

CITATION NO. 2011911

This citation, issued August 17, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal. The accumulation ranged between 3 and 12 inches deep, was 16 feet wide and 16 feet long. It was inby the section dumping point crusher feeder. The area was dry. The surrounding area had been rock-dusted. The section was idle and the power was off. The accumulation was not present on the previous day. The hazard presented by this condition is the possibility that it could contribute to a mine fire if one should occur. Such an event was unlikely however I conclude that a violation was established, which was not significant and substantial. The violation was moderately serious, and the evidence does not show that it resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is $50.

This citation, issued August 31, 1982, charges a violati
30 C.F.R. § 75.400 because of an accumulation of loose coal a
coal dust on and around the chain conveyor electric drive mot
the longwall section. The mine area was wet. The motor was
and was hot to the touch. The motor is completely enclosed i
oblong compartment. There were vents on the side. The accum
tion was on the top and partially covered and obstructed the
on the side. I conclude this condition constituted a violati
30 C.F.R. § 75.400. The hazard presented was that the motor
heat up and cause a fire. I conclude that the violation was
significant and substantial since such an occurrence was like
if the motor continued running. The violation was serious, a
since it had been present for some time, was the result of
Respondent's negligence. I conclude that an appropriate pena
for this violation is $150.

CITATION NO. 2011829

This citation, issued September 2, 1982, charges a viola
of 30 C.F.R. § 75.701, because the metal frame of a cable ski
carrying approximately 100 feet of energized cable was not gr
The standard requires that "metallic frames, casings, and oth
enclosures of electric equipment that can become 'alive' thro
failure of insulation or by contact with energized parts shal
grounded . . . ." The cable skid involved here is used to co
the cable and to store it. It consists of a sled with two ru
and a floor and pipes or standards on the side. I do not con
this to be a metallic frame or other enclosure of electric eq
covered by the standard. Therefore, I conclude that a violat
not established, and the petition will be dismissed with resp
this citation.

ORDER

Based on the above findings of fact and conclusions of
IT IS ORDERED

1. Citation No. 2011911 is AFFIRMED but the violation
significant and substantial.

2. Citation No. 2011827 is AFFIRMED as properly chargi
significant and substantial violation.

3. Citation No. 2011829 is VACATED and the penalty pet
is DISMISSED with respect to it.

Total	150 $200

James A. Broderick
James A. Broderick
Administrative Law Judge

ibution:

A. Pennington, Esq., Office of the Solicitor, U.S. Department
bor, Room 14480 Gateway Building, 3535 Market Street,
delphia, PA 19104 (Certified Mail)

e Q. Symons, Esq., 600 Grant Street, Room 1580,
burgh, PA 15230 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 83-207
	:	A.C. No. 15-02502-03507
v.	:	
	:	No. 18 Mine
SHAMROCK COAL CO., INC., Respondent	:	

DENIAL OF OPERATOR'S REQUEST TO WITHDRAW

ORDER TO SOLICITOR TO SUBMIT SETTLEMENT MOTION OR INFORMATION

On May 5, 1983, the Solicitor filed a penalty proposal in the above-captioned action. The operator failed to answer and on September 14, 1983, I issued a show cause order.

By letter dated September 22, 1983, the operator advises it wishes to withdraw its request for hearing enclosing a copy of a memorandum dated September 6, 1983, written by the MSHA District Manager, Barbourville, Kentucky to an MSHA official stating that this order should not have been specially assessed. The District Manager requests that this item be assessed under the regular formula.

After the penalty proposal was filed by the Solicitor, this Commission had exclusive jurisdiction under the Act. The only way a penalty now can be approved and assessed is by the Commission under section 110 of the Act. The District Manager had no authority to act as he did. The operator's motion to withdraw must therefore be Denied.

It appears that the most expeditious way to handle this matter would be for the Solicitor to discuss the matter with the operator in order to determine if the matter can be appropriately settled. If so, the Solicitor then should file a settlement motion. If the matter cannot be settled, the Solicitor should advise me so the case can be assigned and set down for hearing.

this order.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Carole M. Fernandez, Esq., Office of the Solicitor, U. S. Department of Labor, 280 U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Gordon Couch, Safety Director, Shamrock Coal Company, P. O. Box 130, Manchester, KY 40962 (Certified Mail)

OCT 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 83-47
	:	A.C. No. 36-03425-03507
v.	:	
	:	Docket No. PENN 83-63
UNITED STATES STEEL MINING COMPANY, INC., Respondent	:	A.C. No. 36-03425-03509
	:	Maple Creek No. 2 Mine

DECISION

Appearances: David A. Pennington, Esq., Office of the Solicit U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The above docket numbers were consolidated for hearing and decision since they involve citations issued in September and October 1982, at the same mine. Two citations are included in Docket No. PENN 83-47, and three are involved in PENN 83-63. P suant to notice, the case was heard in Pittsburgh, Pennsylvania on August 30, 1983. Francis E. Wehr, Sr., Alvin Shade, and Oke Wolfe testified on behalf of Petitioner; William K. Schlaupitz, Paul Shipley, Robert C. Tishman and Paul Gaydos testified on be of Respondent. Both parties have filed posthearing briefs. Ba on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO BOTH DOCKET NUMBERS

1. At all times pertinent to these proceedings, Responden was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. Mine.

of these proceedings.

3. The subject mine has an annual production of more than 800,000 tons of coal. Respondent produces more than 15 million tons of coal annually. Respondent is a large operator.

4. The assessment of civil penalties in these proceedings will not affect Respondent's ability to continue in business.

5. In the 24-month period prior to the issuance of the citations involved herein, there were 498 assessed violations at the subject mine, 440 of which were designated significant and substantial. Of these, 47 were violations of 30 C.F.R. § 75.400, 88 were violations of 75.503. This history of prior violations is not such that penalties otherwise appropriate should be increas because of it.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. The subject mine has been classified as a gassy mine. It liberates more than 1 million cubic feet of methane in a 24-hour period.

8. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

DOCKET NO. PENN 83-47

1. Citation No. 2011340, issued September 8, 1982, charges a violation of 30 C.F.R. § 75.400 because of an accumulation of loose coal along a belt line. The accumulation varied from 1 to 35 inches deep, was approximately 75 feet long and 12 to 36 inches wide. There is no dispute as to the existence of the accumulation but the evidence is conflicting as to its nature. The inspector testified that it was wet on top but beneath the top layer there were layers of dry coal and coal dust. He also testified that the mine floor was dry. The assistant mine foreman testified that the accumulation was called muck, that it was "soupy" and could not be shovelled without being dried out. He also testified that the mine floor was wet. In order to abate the violation, rock dust had to be applied to soak up the water, before the accumulation could be handled by shovels. I find that there was an accumulation and that it was of combustible material. I further

tion and cleaned up. I conclude that an appropriate penalty this violation is $50.

2. Citation No. 2011268, issued September 10, 1982, cha a violation of 30 C.F.R. § 75.503 because the conduit was pu out of the packing gland on power wires on a shuttle car. T inspector testified that a permissibility hazard was unlikel because of the location of cable. The violation was origina designated as significant and substantial, but this designat was removed at the hearing. I conclude that a violation occ which was not significant and substantial. The violation wa serious. Since Respondent has been cited for this condition number of occasions previously, I conclude that it resulted negligence. I conclude that an appropriate penalty for this violation is $50.

DOCKET NO. PENN 83-63

1. Citation No. 2010997, issued October 4, 1982, charg violation of 30 C.F.R. § 75.400, because of an accumulation loose coal on the mine floor along the rib of the 48 room en and in the crosscut between 47 and 48 room along the inby ri The accumulation was present along the entire entry and the crosscut. The accumulation averaged 18 inches wide and 20 i deep. It had been left by the previous shift. The coal was The roof bolter was in the crosscut and the other mining mac had been in the area and would return to the area. The subj mine is gassy and has experienced face ignitions. Because o factors, and the extent of the accumulation, I find that the tion was reasonably likely to contribute to a mine fire. It significant and substantial violation and was serious. The of the accumulation (80 feet) leads me to conclude that Resp was negligent in not cleaning it up earlier. I conclude tha appropriate penalty for this violation is $250.

2. Citation No. 2010998, issued October 4, 1982, charg violation of 30 C.F.R. § 75.503, because of a loose bolt on headlight of a shuttle car. The bolt was one of four holdin headlight lens assembly to the body of the headlight. The h presented by this permissiblity violation is that a methane tion in the compartment could escape to the mine atmosphere cause a fire or explosion. Mining was not occurring at the The ventilation was sufficient on the section. Sparking occ within the headlight. Normally the shuttle car does not app within 20 feet of the face. I conclude that this permissibi violation was reasonably likely to cause an injury. It was nificant and substantial. The violation was serious. There

bulldozed up into a pile at the end of a prior shift. An idle shift followed and the accumulation was not cleaned up. The accumulation was more than is normally associated with one cut. The coal was dry with a layer of rock dust on top. The continuous mining machine had broken down while in the process of cleaning th accumulation during the last previous operating shift. I conclude that a violation of the standard was shown. This was an accumulation of combustible material. The hazard presented was that it could contribute to a mine fire. The accumulation was substantial and I conclude that the violation was significant and substantial because it was reasonably likely to result in serious injury. The violation was serious. Petitioner has not established that it was caused by Respondent's negligence. I conclude that an appropriate penalty for this violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED

1. Citation Nos. 2011340 and 2011268 are AFFIRMED, but the significant and substantial designations are REMOVED.

2. Citation Nos. 2010997, 2010998 and 2011000 are AFFIRMED as issued. They charge significant and substantial violations.

3. Respondent shall pay within 30 days of the date of this decision civil penalties for the following violations found herein to have occurred:

CITATION		PENALTY
2011340		$ 50
2011268		50
2010997		250
2010998		100
2011000		100
	Total	$550

James A. Broderick
James A. Broderick
Administrative Law Judge

/fb

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 80-446-M MSHA Case No. 05-03415-05009
v.	:	C-SR-10 Mine
ENERGY FUELS NUCLEAR, INC., Respondent	:	

DECISION

Appearances: Robert Lesnick, Esq., Office of the Solicitor, United States Department of Labor, Denver, Color for Petitioner;
Timothy Borden, Esq., Energy Fuels Corporation, Denver, Colorado
for Respondent.

Before: Judge Carlson

This case, heard under provisions of the Federal Mine Safet and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), aro from a February 12, 1980 inspection of the C-SR-10 underground uranium mine of Energy Fuels Nuclear, Inc. (Energy Fuels). The Secretary of Labor seeks a civil penalty of $2,000.00 because Energy Fuels allegedly compelled miners to drive a 60 foot venti tion raise while working from ladders, in violation of the manda standard published at 30 C.F.R. § 57.7-52, which provides:

> Persons shall not drill from -
>
> (a) Positions which hinder their access to control levers;

was to be used throughout the entire construction process.

The case was heard in Denver, Colorado with both parties rep sented by counsel. The parties originally asked leave to submit post-hearing briefs, but later asked that the case be decided wit briefs.

ISSUE

The issue to be decided here is whether Energy Fuels violate the mandatory standard cited, and, if so, what civil penalty shou be assessed.

REVIEW OF THE EVIDENCE

The undisputed evidence of record shows that Energy Fuels, s months prior to the inspection in this case, foresaw a need to dr a vertical ventilation raise from a lower level drift to an aband room in an upper level. The planned height of the raise was to b approximately 60 feet. The drift itself was approximately seven

---

1/ The inspector initially charged a violation of 30 C.F.R. § 57.3-20, a ground support standard. The citation was administr tively modified by the inspector to charge a "safe access" infraction under 30 C.F.R. § 57.11-1. At trial, counsel for the Secretary moved for leave to amend a second time to charge violat of 30 C.F.R. § 57.7-52. While the government's indecision in selecting the appropriate standard is scarcely praiseworthy, all standards mentioned were arguably related to the nature of the hazard described in the citation, and it was apparent at trial th the final amendment occasioned no prejudice to the operator. The final amendment was therefore allowed, and the hearing proceeded upon a charge that 30 C.F.R. § 57.7-52 was violated. I also note that the inspector's initial action was designated an "order" und section 104(d)(1) of the Act, but was modified to a citation the day when the inspector apparently recognized that there was no pr citation under that section which would serve as a proper predica a withdrawal order. This case was therefore tried as a citation matter.

ety inspection on February 12, and was completed after that date. ond these few background facts, most of the evidence presented by parties was in sharp conflict.

The government premised its case upon the understanding of its ector, Rosendo Trujillo, that Energy Fuels intended to drive the re raise with miners working from ladders. Since it was sputed that miners working in the raise would remove the overhead by drilling and blasting, it followed that the supporting leg of drill would have been rested on a ladder rung below the feet of drill operator. This, according to Trujillo, would have riled the driller. Because of the weight of the drill, and ations caused by its operation, the operator could easily be odged from the ladder, causing a dangerous fall.

Two miners, Clifford Lynn and Leroy Lynn, testified for the etary. They had the same understanding as Inspector Trujillo about techniques to be used in driving the raise.

The first to testify was Clifford Lynn, a shifter or lead miner. aintained that Doug Mempa, the mine foreman, had asked him to drive raise. Mempa, he testified, had informed the miners of the plan the raise project about two weeks before the February 12 inspec-. Lynn's understanding was that the entire raise was to be driven ne miner working from a ladder or ladders. The witness stated that ad never worked on a raise, but that he believed, along with other rs to whom the project was explained, that such a procedure was fe. According to Mr. Lynn, Mempa made no mention of the use of folds or staging as work platforms for the contemplated drilling; were any scaffolding parts available in the mine. Mempa, he said, mention that the miner would be tied off to a J bolt secured in the or side of the raise.

Lynn refused to work in the raise, he testified, and was told by a he would be fired. He was in fact discharged on the Monday re the Secretary's inspection.

The Secretary's witnesses insisted that the raise was driven at a 90 degree angle, but I note that the Secretary's own narrative findings for a special assessment, a part of the file, describe the angle as 60 degrees.

had no experience in driving raises, but he testified that Mem explained that the 4 foot by 4 foot wide raise would be driven feet at a 90 degree angle. At the time his employment ended h not worked in the raise, Lynn testified, nor had he seen any o miner work there. At no time, he testified, did he see any ti or other supplies which could be used to build scaffolding. T raise had been driven about 6 to 10 feet when he last saw it b his job at the mine was terminated, he said.

Inspector Trujillo came to the mine on February 12 in res to a telephone complaint. According to the inspector, most of information came from interviews of the two former miners who testified and two other miners who were still on the job. The gave him to understand that Foreman Mempa had informed them th raise would be driven from ladders with the pneumatic drill an the miner who operated the drill would be secured by lanyards J bolt anchored in the sidewall.

Trujillo testified that no one was in the raise when he s but that at that time it had been driven to a distance of abou 10 feet above the back of the drift. He also observed a muck the raise which reached to a height of 8 to 9 feet from the ba raise. The drift itself, he testified, was about 8 feet high 100).

Inspector Trujillo also maintained that he had no doubts the accuracy of what the miners told him because Doug Mempa, w present a part of the time, did not deny that management inten drive the entire raise from ladders. Moreover, Trujillo obser 10 foot wooden ladder lying in the drift near the raise, but h no materials for building a platform. He further testified th Mempa and two other representatives of management asked him, " wrong with driving a bald-headed raise?" (A bald-headed raise one driven from ladders without the use of timbers, staging or platforms.)

The inspector assumed that a series of ladders would be t fastened together to achieve the height necessary to complete entire raise. Use of ladders, he testified, would subject the drilling from the ladder to great risk of falling and thus ser injury. His chief concern was that the leg of the drill would necessarily rest upon a ladder step or rung. The vibrations f

Energy Fuels' witnesses presented a far different version of t
acts. They did agree that at the time of the inspector's visit no
taging or platforms were in place. They contended, however, that
uch structures could not be installed until the raise had been dri
everal feet above the back of the drift. The stulls or timbers up
hich the planking for the platforms were to rest must, of necessit
e fastened to the side-walls of the raise, they maintained.

The operator's general foreman, Robert Mussleman, testified th
lans for driving the raise were frequently discussed with miners
efore the project was begun. According to Mussleman, management's
lan had always called for the use of a form of scaffolding or stag
hich would be moved upward as the raise progressed. Metal suppor
nown as Montgomery Ward hitches would first be inserted into the
alls. These would support 8 x 8 inch timbers which in turn suppor
he 2 x 8 inch lagging or planking which would serve as the drillin
latform. According to the Mussleman's description, the miner woul
tand on the planking and rest the leg of the drill there. He woul
hen proceed to drill the back above him with drill steels varying
to 6 feet long. Charges would then be inserted, the planking
emoved, and charges detonated. The broken rocks would then fall t
he floor of the crosscut below. As the raise advanced, new hitche
nd timbers would then be installed. Additionally, Mussleman asser
eparate safety lines attached to J bolts would be secured to both
iner and the heavy drill.

Mussleman testified that ladders were indeed to be used to all
ccess to the various levels of the staging as the raise advanced.
e also indicated that the first few feet of the raise was, of
ecessity, to be "bald headed." Explosive rounds, he testified,
ould be fired to push the raise far enough to install timbers. No
rilling, he asserted, would be done from a ladder. Rather, the
iner doing the drilling would stand atop the large muck pile in th
rosscut at the base of the raise. The top of the raise would be
eveled, planking would be placed there to form a solid footing, an
he drill leg would rest on the planking. A ladder would be used,
xplained, only to insert the charges for the third round. (After
he second round, the miner could reach the back of the raise with
he drill steel from a fully extended drill to drill the holes, but
ould likely not reach that far by hand to insert the charges.)

Mussleman claimed that all necessary supplies for the stagings
ere in the mine by the time of the February 12 inspection. The
Iontgomery Ward hitches and the planking were at the mine from form
rojects, he testified, and the 8 x 8 inch timbers were brought in
im in January.

Mussleman acknowledged that no plan for the construction of scaffolding systems had been placed on paper until after Inspect Trujillo's inspection (Tr. 123).

Bernie Willey, a miner whose employment at the mine ended i August of 1980, also testified for Energy Fuels. Willey indicat that he drilled the last 50 feet of the raise from scaffolding. description of the technique used conformed to the description c staging system which Mussleman claimed to be management's plan.

Willey also testified that he was present when Mussleman explained the raise plan, including the use of staging or scaf- folding. The explanation took place before the inspection. The witness had understood that in the early stages, the miner would stand on a ladder but brace the drill leg on the muck pile (Tr 1 Willey's participation began, however, about a month after the citation. At that time the top of the raise was about 15 feet h

Doug Mempa, the mine foreman at the times relevant to this case, testified that he explained the raise project to the miner before it began, and that he at no time represented that the rai would be driven from ladders. Moreover, he maintained that all necessary timbers, hitches, and planking were at the mine before drilling began. The stulls or timbers were delivered by Mr. Mus he testified, during a snowstorm in January; the other supplies already present. Mempa asserted that he saw the raise daily fro time it was begun.

According to Mempa, a miner named Kenneth Chad did the firs The first rounds fired by Chad "booted," leaving an uneven hole. then drilled and shot the next round to "square up" the raise. insisted that neither he nor Chad drilled from a ladder; it was from the top of the muck pile. He did not believe a ladder was in the drift during Inspector Trujillo's visit, but conceded one have been, because ladders were sometimes used in the drift.

Mempa testified that at the time of the inspection he measu height of the raise from the top of the drift and found it to be feet. The drift itself was 7 feet high. Therefore, the total h of the raise was 16 feet. He did not measure the height of the pile but estimated it to be about 5 feet. (Tr. 195-196.)

a day or two before. While there, he saw materials suitable fo
building scaffolding.

In rebuttal, Inspector Trujillo testified that in a subseq
visit to the mine on March 18, 1980 to check on abatement of th
alleged violation, that it appeared that another round had been
making the raise about 2 or 3 feet higher. During his rebuttal
testimony he made clear that he had never seen a miner working
raise. He also acknowledged that if a miner had in fact been a
stand on a lower rung of the ladder to drill while resting the
leg on the muck pile, such activity might not constitute a viol

DISCUSSION

Even a cursory review of the record in this case reveals t
Secretary's evidence is wholly circumstantial. Neither the ins
nor any other witness for the government saw anyone at work in
raise. The question, then, is whether the circumstantial evide
strong enough to establish violation. For the reasons which fo
hold that it is not.

I have no doubt that if the inspector were correct, if the
raise were to have been driven from ladders, the procedure woul
been patently hazardous and a clear violation of the standard
ultimately cited. More particularly, I am convinced that if th
the heavy drill were rested on a rung of the same ladder upon w
miner operating the drill was standing, a violation would occur
matter what the height of the raise. I am not convinced, howev
any violation had occurred at the time of the inspector's citat
The circumstantial evidence presented by the Secretary was of t
types: the words of two miners who related their understanding
entire raise was to be driven from ladders without platforms, a
observations of these witnesses and the inspector of the raise
up to February 12, 1980.

No one disputes that the raise was finished from platforms
sort that the inspector approved. The government would suggest
course, that the Lynns understood correctly that Energy Fuels
originally intended to drive the entire raise from ladders, and
that intent only after the inspector's visit and citation. Ass
that the drilling and blasting activity was done lawfully, up t
time of the inspection, the government's suggestion raises a tr
some question: what steps, if any, may the Secretary take under
to prevent a prospective violation?

estimony of Bernie Willey, a miner whose employment with Energy Fue
ad ended well before the hearing. He therefore lacked any discerna
otive to shade or slant his testimony. Willey fully supported the
anagement testimony that plans to use platforms were made clear to
iners before the raise began. I make no judgments as to the good
aith of the Lynns in professing otherwise, but I find that they wer
istaken in that belief.

This leaves but a single issue to decide. Did the size and sha
f the raise at the time of inspection reveal the use of a ladder as
rill rest in violation of the standard? As mentioned before, no
itness testified that any miner used a ladder rung as a base for th
rill leg. The Lynns inferred that someone did because they had bee
old that the entire raise would be drilled from ladders. Inspecto
rujillo drew the same inference based upon what he was told by mine
no never observed the actual work, and from his knowledge of the
riving of "bald headed" raises in other mines at other times (Tr.
09-210).

Against these inferences I must weigh the evidence of Doug Memp
he foreman who actually directed the other miners who worked in the
aise before February 12, 1980, and who, himself, apparently did mos
f that work. He testified emphatically that all drilling was done
sing the muck pile as a base. He also provided the only testimony
oncerning the actual measurements of the raise on the date of in-
pection. I note that Mempa's measurements were generally consisten
ith the estimates of other witnesses. I further note that, given
eight of the raise at the time of the inspection, Mempa's represen-
ations that drilling up to that time was done from the muck pile we
lausible. Since the top of the raise was 9 feet above the back of
foot drift, the top of the raise was but 11 feet above the muck p
hus, a drill which extended to 8 1/2 feet, used in conjunction with
foot drill-steel, could have been rested on the muck pile to allow
lacement of the last charges detonated before the inspection. I
herefore accept the first-hand testimony of Mempa, who actually
irected and participated in this early phase of the project, over
peculations of those witness who did not see the work done.

In summary, no one seriously contends that any violation occur
nless a miner rested the drill leg on a ladder rung. No credible
vidence demonstrates that the drill was handled in that way. Con-
equently, I must conclude that no violation was proved.

(1) That the Commission has jurisdiction to decide this case.

(2) That the credible evidence of record fails to establish tha
ergy Fuels violated the mandatory safety standard published at 30
F.R. § 57.7-52.

(3) That the Secretary's citation and attendant proposal of civ
nalty must be vacated.

ORDER

Accordingly, the citation and petition for assessment of a pena
e hereby vacated.

John A. Carlson
Administrative Law Judge

stribution:
rtified Mail to

bert Lesnick, Esq., Office of the Solicitor
ited States Department of Labor, 1585 Federal Building
61 Stout Street, Denver, Colorado 80294

mothy Borden, Esq., 3 Park Central, Suite 900
15 Arapahoe Street, Denver, Colorado 80202

lc

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-170 A.C. No. 46-03140-03507
v.	:	
	:	Hampton No. 3 Prep. Plant
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

The parties move for approval of a settlement of thc captioned matter at 80% of the $1,000 amount initially assessed.

The record shows that as a rcsult of the operator's unwarranted disrcgard for compliance a dangerous accumulation of float coal dust and loose coal was found in the operator's Hampton No. 3 Prcparation Plant. The violation was of such a nature that it could significantly and substantially contribute to a mine fire if not promptly abated. The reduction in the penalty is predicated on the parties' claim that the chain of causation was physically attcnuated by the absence of any obvious source of an electrical ignition and the ready availability of adcquate fire suppression equipment.

Neither of these circumstances would preclude a fire that could result from roller friction and that could propogate an explosion of the float coal dust if the coal dust under and around the belt conveyors were cast into suspension as the result of other unforeseen circumstances. The potential of the violation as a contributing factor to a fire hazard is readily foreseeable, that to an explosion remote if not speculative.

Under the S&S criteria Congress intended an operator be held liable not only for the gravity and negligence involved in the immediate violation but also for its reasonably foreseeable consequences, i.e., its contribution to a significantly and substantially greater hazard or danger. Here, for example, the immediate hazard was a slipping hazard due to the presence of water mixed with the coal sludge. But if roller friction in the coal dust caused an ignition a mine fire could result.

In view is, the dispositive issue in applying the S&S criteria is one of reasonable foreseeability of a significant and substantial contribution by the underlying violation to a serious mine health or safety hazard. Reasonable probability that the hazard foreseen will actually occur is merely another factor that adds to the substantiality of the hazard, not to its existence.

There is a widespread belief that unless a violation immediately creates a reasonable probability of a reasonably serious injury or illness it cannot be classified as significant and substantial and must perforce be classified as trivial. 30 C.F.R. 100.4. This constitutes a serious misreading not only of the statutory language but also of the Congressional intent. Congress intended violations be cited as significant and substantial where they are of such a nature as "could" significantly and substantially "contribute" to the "cause or effect" of a mine safety or health hazard. Sections 104(d), (e). This does not mean that the violation cited in a 104(d)(1) citation must, standing alone, present a "significant and substantial" hazard or even a "major" hazard or danger to safety and health. The S&S standard, written by miners for miners, was designed to provide an early warning or alert with respect to violations with an incipient potential for disaster. Compare, Scotia Coal Company, 4 FMSHRC 89 (1982); Sen. Rpt. 95-181, 95th Cong. 1st Sess. 32 (1977). Unless violations with the potential for contributing to such disasters as Scotia are prevented they will continue to recur as recent history amply attests.

S&S violations may be either serious or nonserious depending upon their immediate consequences. Thus, while there was little likelihood that the static condition observed in this case would result in a reasonably serious injury it was fully capable of contributing to a hazard with disasterous potential--a potential that was reasonably foreseeable if the condition was not promptly abated. It is precisely for this reason that nonserious violations may be of "such a nature" as to contribute to a serious mine hazard while a serious violation may have no potential for creating anything other than a need for prompt abatement. Here, for example, if it were convincingly shown that the fire suppression system was capable of dousing the fire before it became dangerous the violation would still be serious but would lack the potential for making a significant and substantial contribution to a hazard capable of causing death

of a violation for such consequences. The immediate consequenc of an ignition in the presence of a small quantity of even a 5% concentration of methane may be negligible but unless the condition, i.e., the "cause" of the ignition or the source of the bleeder, e.g., an impermissibility or a ventilation violation or both is eliminated and prevented the existence of each condition or violation is of "such a nature" as may, i.e., "could" significantly and substantially "contribute" to a much larger ignition, namely an explosion that may take out an entire section or an entire mine.

It is a misnomer and confuses analysis to refer to the "significant and substantial" hazard defined by Congress as an S&S "violation." Congress used the subjunctive mood and the present tense conditional, verb "could" to express its concept of a "hazard" that might materialize at some indefinite time if the underlying "violation," whether serious or nonserious in its immediatc consequences were not abated and the hazard aborted.

While an S&S hazard is not an imminent danger because the certainty of its occurrence is less obvious and the time less definite, it is, as the Scotia case so dramatically demonstrated, just as deadly and dangerous. The difficulty in perception when coupled with the consequences of misperception are so grave as to argue strongly for resolving doubts in favor of the evidence or testimony that supports the S&S finding. Consequently, if a hazard is reasonably foreseeable it should be considered significant and if it is of such a nature that it is capable of "contributing" to a condition or practice that could result in serious physical harm it should be deemed substantial.

I firmly believe that if the S&S standard is to have the scope intended by Congress, it must be used to prevent the occurrence of violations that sow the seeds of disaster for either individual miners or groups of miners. Operators owe miners a duty not only to prevent serious violations but all violations of whatever gravity that may contribute to hazards with serious consequences for the health and safety of the industry's most important resource--the miner.

independent evaluation and de novo review of the circumstances, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, $800, on or before Friday, November 18, 1983, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

F. Thomas Rubenstein, Esq., P.O. Drawer A & B, Big Stone Gap, VA 24219 (Certified Mail)

/ejp